NLWJC - KAGAN

STAFF & OFFICE - D.C. CIRCUIT

BOX 002 - FOLDER 009 DC

Elena Kagan Law Review 3 [8]

FOIA Number: Kagan

FOIA MARKER

This is not a textual record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

Collection/Record Group: Clinton Presidential Records

Subgroup/Office of Origin: Counsels Office

Series/Staff Member: Sarah Wilson

Subseries:

OA/ID Number: 14685

FolderID:

Folder Title:
Elena Kagan Law Review 3 [8]

Stack:	Row:	Section:	Shelf:	Position:
V	13	2	10	3

including an account of the points covered in the Executive Memorandum, see Richard A. Falk, Working Paper, in The Hammarskjold Forums, supra note 83, at 1, 42 -- 45. For excerpts from the Attorney General's testimony, see William H. Reeves, The Sabbatino Case and the Sabbatino Comedy -- or Tragedy -- of Errors, 20 Vand. L. Rev. 429, 507 (1967).

n108 The Amendment has been held to refer only to a claimant's specific property found in the United States, not to all assets of a nationalizing state that may come within the jurisdiction of the court. See First Nat'l City Bank, 431 F.2d at 400 -- 02; French v. Banco Nacional de Cuba, 242 N.E. 2d 704, 712 -- 15 (N.Y. 1968). Further, many act of state cases do not involve an alleged violation of international law, including cases in which a government expropriates the property of one of its own nationals.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

First National City Bank v. Banco Nacional de Cuba n109 focused on the application of the act of state doctrine to counterclaims and the validity of the "Bernstein exception" -- whether the Court should apply the act of state doctrine in the face of an Executive recommendation to the contrary. n110 Five Justices held that First National City Bank should be allowed to recover the value of its expropriated assets up to the amount set off against Cuba's initial claim, but for disparate reasons. Three Justices supported the Bernstein exception; n111 one Justice held that the doctrine should not apply as a defense to a counterclaim; n112 and one Justice applied the balancing test set forth in Sabbatino and concluded that the facts and circumstances of the case justified review of the validity [*1938] of the expropriation. n113 In a dissent written by Justice Brennan, the four remaining Justices followed Sabbatino, recharacterizing the act of state doctrine as a foreign affairs version of the political question doctrine and arguing that the same considerations that precluded review of the foreign act of state in Sabbatino should apply equally here. n114 The dissenters and two members of the majority also rejected the Bernstein exception. n115

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n109 406 U.S. 759 (1972) (Rehnquist, J., plurality opinion).

n110 Although the Sabbatino court had ruled in favor of a political resolution of the underlying dispute in accordance with the Executive position in the case, it had explicitly declined to rule on the validity of the Bernstein exception. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 436 (1964).

n111 See 406 U.S. at 764 -- 70 (Burger, C.J., White, Rehnquist, JJ.).

n112 See id. at 770 -- 73 (Douglas, J., concurring).

n113 See id. at 774 -- 76 (Powell, J., concurring).

n114 See id. at 785 -- 90, 795 -- 96 (Brennan, Stewart, Marshall, and Blackmun, JJ., dissenting).

n115 See discussion infra text accompanying notes 189 -- 200.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The second Supreme Court act of state case in the 1970s was Alfred Dunhill of London, Inc. v. Republic of Cuba, n116 decided in 1976. The facts of the case were extraordinarily complicated, involving claims and counterclaims among American tobacco importers, the original Cuban tobacco exporters, and the "interventors" appointed to manage the Cuban tobacco industry following nationalization. n117 Although the Executive effectively invited the Court to overrule Sabbatino, n118 the Court split again on a different hodgepodge of rationales. Of the majority, five Justices agreed that the act in question -- a repudiation of a judicially imposed obligation -- did not qualify technically as an "act of state" because of Cuba's failure to demonstrate that it had been carried out with the requisite sovereign authority; n119 four of those five sought to establish an additional exception to the act of state doctrine for "commercial" as opposed to governmental acts. n120 The same four dissenters as in First National City Bank, this time led by Justice Marshall, found that the act in question did indeed qualify as an act of state, n121 rejected the commercial acts exception, n122 and again reasserted the logic of Sabbatino to bar review. n123

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n116 425 U.S. 682 (1976).

n117 For a discussion of the facts in Dunhill, see id. at 685 -- 90.

n118 Prior to handing down its decision, the Court specifically requested argument on the question whether its holding in Sabbatino should be reconsidered. See 422 U.S. 1005 (1975). The Legal Adviser to the State Department, Monroe Leigh, responded with the observation that the Executive would not object if the Court decided to overturn Sabbatino, because as a practical matter, adjudication of act of state cases had not embarrassed the Executive's conduct of foreign relations. These views were set forth in a letter to the Solicitor General reprinted as an appendix to the Opinion. See 425 U.S. at 706 app. 1 (Letter from Monroe Leigh, Legal Adviser to Dep't of State, to Solicitor General (Nov. 26, 1975)).

n119 See 425 U.S. at 691-95 (Burger, C.J., White, Powell, Rehnquist, and Stevens, JJ.).

n120 See id. at 695-706. Justice Stevens refused to join in this portion of the opinion. See id. at 715 (Stevens, J., concurring).

n121 See id. at 716 (Marshall, J., dissenting).

n122 See id. at 724-30 (Marshall, J., dissenting).

n123 See id. at 729-30 (Marshall, J., dissenting).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

After a long silence, the Supreme Court turned once more to the act of state doctrine in 1990, in W.S. Kirkpatrick & Co. v. Environmental [*1939] Tectonics Corp., International. n124 The specific issue before the Court was whether the act of state doctrine could bar adjudication of a civil RICO

action between two U.S. defense contractors when the racketeering activity charged involved the bribery of a Nigerian government official. n125 A unanimous Court held that it could not, on the ground that the doctrine could only be properly raised in cases in which the validity of the act of a foreign sovereign was directly at issue, not in the broader category of cases questioning the motives of a foreign official. n126 The Court thus effectively established a new threshold requirement for even the potential applicability of the doctrine.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n124 493 U.S. 400 (1990).

n125 See id. at 401-02.

n126 An underlying assumption of all act of state cases in the Supreme Court is that an initial application of the conflicts-of-law rules of the forum would at least arguably point to the foreign law as the governing law, thus setting up the choice between domestic and foreign law that a court must either make or reject by applying the act of state doctrine. In a few act of state cases decided after Sabbatino, however, the act of state doctrine was raised as a defense in circumstances that would not normally even present a choice between forum law and foreign law, but rather where application of U.S. law could be read to impugn the motives of the foreign government. See, e.g., Sage Int'l, Ltd. v. Cadillac Gage Co., 534 F. Supp. 896, 909-10 (E.D. Mich. 1981); Dominicus Americana Bohio v. Gulf & W. Indus., 473 F. Supp. 680, 690 (S.D.N.Y. 1979). Similarly, no party in Kirkpatrick was challenging the validity of a specific Nigerian government act, but only the motivation of a Nigerian government official.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

D. Academic Debates

Not surprisingly, this plethora of judicial positions has generated enormous academic debate among champions of one or more exceptions to the act of state doctrine, as well as advocates of its wholesale revision or reconceptualization. Each of these scholars typically begins with one of the various strands of the act of state doctrine and argues for its superiority. n127 Some have proposed entirely new approaches, subsuming the doctrine within jurisdiction to prescribe n128 or sovereign immunity analysis, n129 or describing it as a rule of repose. n130 Overall, however, the battle lines continue to be most starkly drawn along the [*1940] same divide that emerged prior to Sabbatino. n131 Should the doctrine be understood as a conflicts rule, such that recognition of a foreign act of state should be understood as actual application of the foreign law, thereby resurrecting the public policy and international law exceptions? Or is it a rule of judicial restraint to be applied in any case in which the judiciary deems that the dispute at issue would be better resolved by the political branches?

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n127 The most comprehensive guides to the range of positions in the current literature are Restatement (Third), supra note 102, @ 443 reporters notes 1-13, and Joseph W. Dellapenna, Deciphering the Act of State Doctrine, 35 Vill. L. Rev. 1 (1990). For commentary on the Restatement, however, see Malvina

Halberstam, Sabbatino Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law, 79 Am. J. Int'l L. 68, 68-85 (1985).

n128 See Daniel C.K. Chow, Rethinking the Act of State Doctrine: An Analysis in Terms of Jurisdiction to Prescribe, 62 Wash. L. Rev. 397, 400-03 (1987).

n129 See Christine G. Cooper, Act of State and Sovereign Immunity: A Further Inquiry, 11 Loy. U. Chi. L.J. 193, 234-35 (1980); see also Carsten T. Ebenroth & Louise E. Teitz, Winning (or Losing) by Default: The Act of State Doctrine, Sovereign Immunity and Comity in International Business Transactions, 19 Int'l Law. 225, 252 (1985) (suggesting need for commercial acts exception to act of state doctrine to allow meaningful application of Foreign Sovereign Immunities Act of 1976).

n130 See Dellapenna, supra note 127, at 45-53.

n131 See supra part II.A.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

In the decades since Sabbatino,, this basic debate has received new impetus from two sources. The first is empirical: both the reasoning and results of a number of lower court decisions applying the act of state doctrine are entirely consistent with an understanding of the doctrine as a conflicts rule. n132 Second, the original coalition supporting a conflicts view has expanded and strengthened in several directions. Beginning in the late 1970s, human rights litigators began to perceive the act of state doctrine as a bar to efforts to sue foreign torturers in U.S. courts under the Alien Tort Statute. They thus joined forces with the original anti-Sabbatino coalition in support of a second attempt to legislate an international law exception to the doctrine in 1981. n133 Another school, taking up where the Legal Adviser left off in Dunhill, n134 renewed the academic assault on Sabbatino primarily in terms of the injustice of denying U.S. litigants their day in court by refraining from adjudication in act of state cases, as well as the inadvisability of judicial determinations concerning foreign affairs. n135 This was the official position of the American Bar Association in an amicus brief filed in Kirkpatrick, recommending both the reasoning and the result ultimately adopted by the [*1941] Court in that case. The brief called directly for returning the act of state doctrine to its "conflict of laws origins," thereby resurrecting the international law exception and sharply limiting application of the doctrine. n136

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n132 See infra part IV.

n133 Senators Mathias and Domenici sponsored legislation to abolish the doctrine in all cases involving a violation of international law. In Senator Mathias' view, "The International Rule of Law Act" would "permit the United States . . . to participate in the development and in the application of international law." The International Rule of Law Act: Hearings on S. 1434 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 1-2 (1981) (opening statement of Chairman Mathias); see also Charles MaC. Mathias, Jr., Restructuring the Act of State Doctrine: A Blueprint for Legislative Reform, 12 Law & Pol'y Int'l Bus. 369, 371 (1980) (advocating revising act of state doctrine to require judge to reach merits where there is

contravention of international law); Ralph Oman, The Mathias Proposal: S. 1434, in Act of State and Extraterritorial Rèach 9, 9-12 (John R. Lacey ed., 1983) (explaining Mathias' views on proposed legislation); Don Wallace, Jr., Introductory Remarks, in Act of State and Territorial Reach, supra, at 3, 4-5 (Mathias' four possible approaches to solve act of state problem). The initiative failed, but by 1986 a leading international human rights litigator was again calling for the wholesale abolition of the doctrine. See Bazyler, supra note 49, at 396-98.

n134 See supra note 118.

n135 Shortly after Dunhill was handed down, Monroe Leigh and his co-author Michael Sandler published an article fleshing out the position articulated in the Legal Adviser's Letter to the Solicitor General in Dunhill. See Monroe Leigh & Michael D. Sandler, Dunhill: Toward a Reconsideration of Sabbatino, 16 Va. J. Int'l L. 685, 716-18 (1976).

n136 Brief for the American Bar Association as Amicus Curiae at 2, W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l, 493 U.S. 400 (1990) (No. 87-2066) [hereinafter ABA Brief]. The principal author on the ABA brief was Michael Sandler, who used much of the same analysis of the doctrine he originally developed in his article. See Leigh & Sandler, supra note 135, at 716-18.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

On its face, Kirkpatrick did not address the substance of the act of state doctrine, but only established a threshold requirement for even engaging in the Sabbatino balancing test to determine whether the doctrine should bar review. n137 A closer look at the reasoning and background of the decision, however, reveals a decided, if subterranean, tilt back toward a view of the doctrine as a conflicts rule. In recommending the result reached by the Court, the ABA brief particularly emphasized the original role of the doctrine in allocating competence between domestic and foreign courts charged with reviewing the validity of a foreign state act. n138 This original function, according to the ABA, required the presence of a challenge to the validity of the act of a foreign sovereign as a threshold test for application of the doctrine. n139 And so the Supreme Court found. n140

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n137 See supra notes 124-126 and accompanying text.

n138 See ABA Brief, supra note 136, at 4.

n139 The authors of the brief conclude: "A court need only determine if the case before it requires review of the validity of a foreign state act fully performed in the foreign state's own territory and governed by the foreign state's own laws. If such review of validity is required, the doctrine bars adjudication of that issue . . .; otherwise, the case proceeds in the normal fashion." Id. at 16.

n140 The Court's precise formulation of the threshold test further supports a conflicts view of the doctrine itself. According to the Kirkpatrick opinion, the "factual predicate for application of the act of state doctrine" is the

requirement that a court "declare invalid, and thus ineffective as 'a rule of decision for the courts of this country' the official act of a foreign sovereign." W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp, Intl., 493 U.S. 400, 405 (quoting Ricaud v. American Metal Co., 246 U.S. 304, 310 (1918)). This emphasis on the doctrine as a "rule of decision," a phrase taken from Ricaud v. American Metal Co., 246 U.S. 304, 310 (1918), reappears later in the opinion together with a phrase taken out of context from Banco Nacional de Cuba v. Sabbatino describing the doctrine as a "'principle of decision binding on federal and state courts alike.'" Kirkpatrick, 493 U.S. at 406 (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 (1964)) (emphasis added). Both are used to refute the view of the doctrine as a "vague doctrine of abstention," id. at 406 -- the nemesis of the conflicts view and code for the alleged derailment of the doctrine in Sabbatino. By coupling the language from Ricaud with language from Sabbatino in opposition to the abstention view, Kirkpatrick appears to put the doctrine back on its historical tracks -- just as requested by the ABA.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

III. A LIBERAL INTERNATIONALIST ANALYSIS OF THE ACT OF STATE DOCTRINE IN THE SUPREME COURT

Application of the liberal internationalist model to the major [*1942] Supreme Court act of state precedents yields the following interpretation of the act of state doctrine. The doctrine is two doctrines in one and will retain this dual character as long as it must apply to two very different groups of states. Application of the doctrine to acts of liberal states is perfectly consistent with an ordinary conflicts analysis directing the court to apply foreign law. Application of the doctrine to acts of nonliberal states, however, cannot be comfortably understood as an application of the foreign law itself. To avoid this result, the doctrine is better characterized as a judicial determination of the limits of judicial competence and the expression of a corresponding preference for a political rather than a legal solution. The assumptions underlying each [*1943] of these conceptions of the doctrine are directly opposed to one another, giving rise to a fundamental tension at the heart of the doctrine that cannot be subsumed or resolved by doctrinal reclassification. A liberal internationalist analysis suggests, by contrast, that the intuitions and perceptions likely to inform a court's understanding of the limits of its own competence correspond to tangible distinctions between liberal and nonliberal states. Application of the act of state doctrine to nonliberal states thus effectively marks the boundary of the zone of law.

[SEE ILLUSTRATION IN ORIGINAL]

A. A Liberal Internationalist Analysis of Sabbatino

Sabbatino marks a sharp transition between the two understandings of the act of state doctrine and at the same time illustrates the tension between them. The Court's application of the doctrine left the Cuban nationalization decree undisturbed -- exactly the same practical result that would have obtained from a straightforward application of Cuban law. Yet the Court went to great lengths to characterize its decision as something other than the application of Cuban law. An understanding of the reasons behind this posture illuminates the limitations of the act of state doctrine as a conflicts rule. The liberal internationalist analysis presented here examines the assumptions that would

have informed an understanding of the act of state doctrine as a conflicts rule and explores the dissonance between any such understanding and the facts and circumstances of Sabbatino. It concludes that the Court adopted a separation of powers rationale to avoid the implications of applying the doctrine as a conflicts rule.

1. The Sabbatino Quandary: Implications of Applying the Act of State Doctrine as a Conflicts Rule. -- Two obstacles appeared to bar the Court from reaching the result it sought under ordinary conflicts principles: the public policy exception and the international law exception. Yet, as demonstrated by the lower courts, several leading commentators, and various passages in the Sabbatino opinion itself, both these obstacles could have been circumvented in a way that would have preserved an understanding of the act of state doctrine as a conflicts rule. The Court decisively rejected these various options.

Regarding the public policy exception, the district court in Sabbatino had already concluded that the act of state doctrine was available "to assure respect for foreign territorial acts of state that violate [U.S.] public policy without violating international law." n141 Similarly, Louis Henkin was quick to analyze the Sabbatino version of the act of state doctrine as a "special rule . . . of conflicts of law" overriding the normal public policy exception. n142 Henkin's characterization has been widely [*1944] followed, n143 and appears in the Restatement (Third) of Foreign Relations Law of the United States. n144 It was not, however, the path chosen by the Sabbatino Court.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n141 Falk, supra note 82, at 80 (emphasis omitted). This is Richard Falk's characterization of Judge Dimock's decision.

n142 See Henkin, Act of State, supra note 102, at 178; Louis Henkin, The Foreign Affairs Power of the Federal Courts: Sabbatino, 64 Colum. L. Rev. 805, 820 n.51 (1964) [hereinafter Henkin, Foreign Affairs Power]; Henkin, Remarks, in The Hammarskjold Forums, supra note 83, at 100, 100-01 [hereinafter Henkin, Remarks]. Henkin sought to allay fears about the constitutionality of the Sabbatino version of the act of state doctrine, addressing the question of where, in a firmly post-Erie era, the Supreme Court derived the power to declare a rule dictated neither by the Constitution nor by international law. See Henkin, Foreign Affairs Power, supra, at 820 n.51. The Sabbatino Court said, at least by implication, that the power flowed from the inherent federal interest in the conduct of foreign relations. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423-27 (1964). Henkin also worried that characterization of the doctrine as a rule of "abstention" ceded too much ground to Sabbatino opponents who claimed that litigants in act of state cases were unconstitutionally deprived of their day in court. Henkin, Remarks, supra, at 101.

By characterizing the doctrine as a "special rule . . . of conflicts," Henkin solved both of these problems. As part of the larger area of choice of law, the act of state doctrine falls within an area of special judicial expertise at the heart of the judicial power. He also recast Sabbatino and its progeny as cases "decided on [their] merits in accordance with what the courts conclude is the controlling substantive law." Id. at 101. It is important to note that Henkin's "special conflicts rule" mandates precisely the opposite result from that advocated by champions of the doctrine as a "normal" conflicts-of-law rule. Only thus can the Restatement (Third), of which Henkin was Chief Reporter,

characterize the doctrine as both a rule of restraint and a conflicts-of-law rule. See Restatement (Third), supra note 102, @ 443 cmt. a, reporters' note 1.

n143 See, e.g., Chow, supra note 128, at 431 n.218; Clyde Crockett, The Relationship Between the Act of State Doctrine and the Conflict of Laws and Choice-of-Laws Rules, 10 N.Y.L. Sch. J. Int'l & Comp. L. 309, 312 (1989); Edith Friedler, Party Autonomy Revisited: A Statutory Solution to a Choice-of-Law Problem, 37 Kan. L. Rev. 471, 519 n.241 (1989); H. Thomas Byron III, A Conflict of Laws Model for Foreign Branch Deposit Cases, 58 U. Chi. L. Rev. 671, 684 (1991).

n144 See Restatement (Third), supra note 102, @ 443 cmt. a, reporters' note 1.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The international law exception should have proved similarly malleable for a court determined to reach the Sabbatino result on conflicts grounds. The Court could have simply overridden the international law exception by deciding, as it did as a supporting ground for its decision, that the exception was not applicable on the facts before it because of the impossibility of determining the scope and content of the governing international legal rule. n145 It could have, as it did in passing, refuted the alleged precedential basis for the international law exception by holding that U.S. courts, unlike some of their British counterparts, [*1945] had traditionally applied the doctrine without an international law exception. n146 Or it could have, as was suggested by a leading international lawyer in an article cited in Sabbatino, n147 adopted an understanding of conflicts-of-law rules in general, and the act of state doctrine in particular, as the foundation of a "horizontal" world legal order institutionalizing mutual deference and respect among widely diverse nations. On this view, recognition of an international law exception would unfairly and unwisely privilege a "vertical" norm of substantive international law in a fashion ultimately detrimental to international order. n148

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n145 The majority felt that application of the international law exception would require it to make ideological choices rather than legal choices. Here the Court addressed the question of an underlying consensus directly, reserving the possibility of future application of such an exception in cases involving a "greater . . . degree of codification or consensus concerning a particular area of international law." Sabbatino, 376 U.S. at 428. On the issue raised in Sabbatino, however, the Court found it impossible to ascertain the correct international legal standard for compensating expropriated aliens. Justice Harlan observed gloomily that "[i]t is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations." Id. at 430 (Harlan, J.). To press the point, he added in a footnote that the decision was in no way intended to prohibit U.S. courts from considering questions of international law in areas "which do not represent a battleground for conflicting ideologies." Id. at 430 n.34 (Harlan, J.).

The Court recognized the inconsistency between this portion of the decision and the Executive's denunciation of the Cuban expropriation as a violation of international law but justified it on the grounds that the Executive must

express the U.S. view of what international law should be, whereas the Court must take a more cautious stance. See id. at 432-33.

n146 See id. at 430-31 (concluding that earlier U.S. precedents should be read to hold that act of state doctrine is applicable even if international law has been violated); see also id. at 421 n.21 (citing English precedent in which international law exception is applied).

n147 See Falk, supra note 77, at 1, 30.

n148 See discussion infra text accompanying notes 172-174.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The Court took none of these routes, opting instead for an entirely different characterization of the doctrine as a delimitation of judicial competence based on the principle of separation of powers. Why? The answer lies in the broader assumptions underlying the application of a foreign law under traditional conflicts-of-law principles. These assumptions are embedded in the traditional Anglo-Saxon conception of the nature and scope of the public policy exception, the notion of standing in for the foreign court when applying foreign law, and a particular understanding of the principle of comity.

a. The Public Policy Exception. -- Louis Henkin and others have described the act of state doctrine as a "special conflicts rule," overriding the normal public policy exception. I contend that to the extent the conflicts view of the doctrine envisages the application of foreign law under conflicts rules, the public policy exception cannot be overridden without violating the integrity of the court and the legal system of which it is a part. To sustain this proposition, it is necessary to examine the history and purpose of the public policy exception as it has developed in Anglo-American law.

The public policy exception can be briefly stated: when normal choice of law principles point to application of the foreign law, a court can reject this course when the law in question violates the fundamental public policy of the forum. n149 The underlying principle at work flows [*1946] from an understanding of conflicts of law as a branch of municipal law; as Lord Parker put it, "obviously there can be no branch of municipal law in which the general policy of such law can be properly ignored." n150 By implication, when a court does not invoke the public policy exception and proceeds to apply the law, that law is consistent with, or at least not fundamentally objectionable to, the public policy of the forum. This consistency does not mean, however, that the foreign law necessarily matches what forum legislators would prescribe. The question is always to strike the right balance between "different" and "wrong." In Justice Cardozo's celebrated formulation,

We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home. . . . The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal. n151

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n149 See Restatement (Second) of Conflict of Laws @ 90 cmt. a (1971) ("No action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum."). For comprehensive histories and analyses of the public policy exception, see Nicholas de Belleville Katzenbach, Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law, 65 Yale L.J. 1087 (1956); J. Kosters, Public Policy in Private International Law, 29 Yale L.J. 745 (1920); Arthur Nussbaum, Public Policy and the Political Crisis in the Conflict of Laws, 49 Yale L.J. 1027 (1940); see also F.A. Mann, Foreign Affairs in English Courts 148-62 (1986) (tracing development of public policy doctrine in British foreign affairs law).

n150 Dynamit Actien-Gesellschaft v. Rio Tinto Co., 1918 App. Cas. 292, 302 (appeal taken from Eng.) (Parker, L.J.).

n151 Loucks v. Standard Oil Co., 120 N.E. 198, 201-02 (N.Y. 1918). This was an enforcement of judgments case, a specialized branch of private international law. See id. at 198. The principle applies equally to application of a foreign law.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

This implicit tolerance for international pluralism within certain predetermined limits is analogous to what I have termed the liberal internationalist principle of legitimate difference. The existence of the public policy exception as an escape hatch for a state applying the laws of a foreign state thus creates a presumption that a foreign law actually applied has been deemed to be within the zone of legitimate difference -- and can thus be recognized "as law" within both states.

Any effort to characterize the Sabbatino result in conflicts terms thus necessarily assumes that the United States Supreme Court ultimately applied and validated the Cuban law as "law" -- as a formal rule of decision within the zone of legitimate difference. That, I suggest, is a proposition the Court could not accept in any guise. The very notion of legitimate difference presents the public policy exception as an essential safeguard to protect the integrity of the forum court and the policy it regulates. n152 If, as Cardozo contends, a violation of public policy [*1947] equals a violation of "some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal," n153 then transgressions of this magnitude cannot be "overridden." On the contrary, they define the parameters of what can fairly be described as a conflict of "law." On this logic, a conflicts rule mandating application of a "law" that violates public policy, that falls outside the zone of legitimate difference, is a contradiction in terms.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n152 A corollary of this proposition is that when sufficient other safeguards exist to protect the integrity of the polity and its courts, the need for the public policy exception should be correspondingly diminished. The best example is among the sister states in the United States, where the Constitution is the ultimate guardian of consistency with fundamental public policy principles. Beyond the boundaries of a federal state, the need for the public policy exception should similarly recede among a group of states with very similar basic values and institutions.

n153 Loucks, 120 N.E. at 202.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

b. Sitting as a Foreign Court. -- A second traditional conflicts principle is that a court applying foreign law effectively puts itself in the place of the foreign court. n154 If a "contract had been made in France between two Frenchmen and was to be performed in France," a well-known conflicts text explains, "an English court would apply French law to most of the matters in dispute before it, just as a French court would naturally apply French law to all such matters." n155 The metaphysics of this conception have been much debated among American conflicts scholars. n156 As a practical matter, however, the concept of "applying" foreign law implies that a national court can comfortably equate itself with the foreign court, or at the very least conceive of itself performing a parallel function. In a larger sense, this mental transposition requires accepting at least the fundamental structure and functions of the foreign legal system as within the ambit of legitimate difference.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n154 Zander and Mann contended prior to Sabbatino that a court choosing foreign law should be prepared to go one step further and review the constitutional validity of that law to the same extent that a foreign court would. See Zander, supra note 77, at 834-35; Mann, supra note 77, at 157-59. However, although both commentators quote a number of authorities in support of this position, both also ultimately admit that the case law on point is mixed. The United States Supreme Court did exercise such review on behalf of the Mexican Supreme Court in another act of state case, Shapleigh v. Mier, 299 U.S. 468, 471-73 (1937). But see Banco de Espana v. Federal Reserve Bank of New York, 114 F.2d 438, 443 (2d Cir. 1940) (question of validity under Spanish law of secret decree not open to examination by a U.S. court); Earn Line S.S. Co. v. Sutherland S.S. Co., 254 F. 126, 129 (S.D.N.Y. 1918) (action of British Admiralty in requesting British steamer must be deemed legal by U.S. courts), aff'd sub nom. The Claveresk, 264 F. 276 (2d Cir. 1920). The Sabbatino Court subsequently addressed this question in response to a charge by defendant that the Cuban expropriation decree did not comply with the formal requisites of Cuban law; it held that inquiry into the validity of an act of state under the foreign law (foreign "judicial review") would be "exceedingly difficult" and "highly offensive." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 415 n.17 (1964). A brief scan of the precedents on both sides of this issue suggests that application of the liberal-nonliberal distinction could also help illuminate the debate over when such review is appropriate.

n155 J.H.C. Morris, The Conflict of Laws 3 (2d ed. 1980) (citation omitted).

n156 For a brief overview of the principal positions in a long and complicated debate, see Roger C. Cramton et al., Conflict of Laws 7-8 (2d ed. 1975).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

This principle is equally at variance with the circumstances of Sabbatino. [*1948] The Supreme Court could in no way equate itself with a Cuban court or metaphorically participate in the administration of the Cuban legal system. The Executive was formally on record denouncing the expropriation. And even in

the absence of a formal statement from the Executive, this was 1964 -- only eighteen months after the Cuban Missile Crisis. The two nations could not have been further apart.

c. Comity. -- Comity is the foundation on which the rules governing private international conflicts of law is built. Consider the Supreme Court's classic definition of comity in Hilton v. Guyot, n157 an 1885 case concerning the enforcement of foreign judgments:

"Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws. n158

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n157 159 U.S. 113 (1895).

n158 Id. at 163-64.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

As is implicit in the Hilton formulation, and as Dicey spelled out in the introduction to the second edition of his celebrated treatise on conflicts of laws twenty years later, n159 comity is a principle grounded not on courtesy but on a conception of the transnational rule of law. Dicey's formulation of the problem was astute and typically acerbic:

If . . . the assertion that the recognition or enforcement of foreign law depends upon comity means only that . . . when English judges apply French law, they do so out of courtesy to the French Republic, then the term 'comity' is used to cover a view which . . . affords a singular specimen of confusion of thought produced by laxity of language. n160

He continued,

The application of foreign law is not a matter of caprice or option; it does not arise from the desire of the sovereign of England, or of any other sovereign, to show courtesy to other states. It flows from the impossibility of otherwise determining whole classes of cases without gross inconvenience and injustice to litigants, whether natives or foreigners. n161

The underlying concern here is recognition that individuals must have some way to know the rules that govern their conduct, and that it is unfair and irrational to let those rules be determined after the fact by [*1949] the happenstance of the tribunal's location. Domestic courts must thus be prepared to adopt general principles allowing them to apply each other's law when fairness and predictability so require. n162

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n159 See A.V. Dicey, A Digest of the Law of England with Reference to the Conflict of Laws (2d ed. 1908).

n160 Id. at 10.

n161 Id. at 10-11. This is the edition cited by Holmes in cases such as American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909), and Cuban R.R. Co. v. Crosby, 222 U.S. 473, 479 (1912).

n162 In the quote from Loucks v. Standard Oil Co., 120 N.E. 198, 202 (1918), Judge Cardozo similarly insisted "courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness." See supra note 151 and accompanying text.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

This formulation of comity also assumes a measure of reciprocity, according to which each nation within the system is willing to apply the laws of the other under specified conditions. n163 Only thus can nations balance the advantages accruing to individual citizens operating transnationally with a minimum assurance that the policies embedded within their own laws will be effectuated by other states. n164 Reciprocity in turn depends upon an assumption of long-term interaction. Here again Dicey is instructive: "The growth of rules for the choice of law is the necessary result of the peaceful existence of independent nations combined with the prevalence of commercial intercourse." n165 Finally, the principal players within this system are courts themselves in more or less independent dialogue with one another, signalling anticipated courses of behavior and using both carrots and sticks to encourage mutual adoption of specific rules. n166

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n163 In Hilton v. Guyot itself, the Supreme Court ultimately declined to enforce a French judgment on the ground that France did not extend reciprocal treatment to U.S. judgments under similar circumstances. See Hilton v. Guyot, 159 U.S. 113, 227-28 (1895).

n164 I speak here of some measure of system-wide reciprocity, according to which nations can be assured that other nations are willing to enforce their laws at least some of the time. This principle need not translate into tit-for-tat reciprocity in every case, in which a court declines to enforce a particular foreign law or judgment unless assured that a court of the foreign country in question would reciprocate under similar circumstances. It is interesting in this regard that many U.S. courts have moved away from the Hilton v. Guyot rule in individual cases, on the ground that the interests of the individual parties in certainty, predictability, and finality of judgments should prevail. See Gary B. Born & David Westin, International Civil Litigation in U.S. Courts 586-87 (1989) (reviewing cases). It may also be that the importance of principles of reciprocity varies inversely with the degree of transnational interaction across a particular system, suggesting that states are more concerned to protect their public interests under conditions of relatively lesser interdependence.

n165 Dicey, supra note 159, at 8.

n166 This is not to suggest that specific choice-of-law rules among a particular group of states are in fact uniform, but only that courts will push in this direction.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The Sabbatino Court could hardly justify applying Cuban law on the basis of comity. Fairness and predictability for individual citizens, in terms of meeting the ex ante expectations of the U.S. property-owners, would have dictated a very different result. Similarly, at the inter-state level, a U.S. court would have had no reason to apply Cuban law in the hope of obtaining a reciprocal response from either a Cuban court or the Cuban legislature. For both individuals and states, these considerations were rendered moot by the abrupt cessation of any prospects for [*1950] long-term interaction between the two countries. In the judicial context in particular, as the Sabbatino Court observed, the normal "private law model" of individual dispute resolution was displaced by anticipation of a negotiated lump sum settlement of individual claims on both sides. n167

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n167 See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 431 (1964). As the Court observed: "Following an expropriation of any significance, the Executive engages in diplomacy aimed to assure that United States citizens who are harmed are compensated fairly. Representing all claimants of this country, it will often be able . . . to achieve some degree of general redress." Id. (emphasis added). It follows that to have treated the U.S. claimants in Sabbatino as normal litigants under normal conflicts-of-law principles would have unfairly advantaged those litigants with respect to other similarly situated U.S. claimants, since the Sabbatino claimants would have received the full value of their investments while other claimants would have received only pro rata compensation under a lump sum agreement.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

2. The Sabbatino Solution: Applying the Act of State Doctrine as a Delimitation of Judicial Competence. -- The above analysis suggests that the entire "constitutional underpinnings" analysis of the act of state doctrine in Sabbatino was not simply a detour around the public policy and international law exceptions, but rather a more fundamental statement that the act of state doctrine could not function as a conflicts rule on the particular facts of the case. More broadly, the shift from a conflicts rationale to a separation-of-powers rationale can be understood as a claim that the judicial competence to interpret or apply another state's law extends only as far as the assumptions underpinning ordinary conflicts rules can reasonably be extended.

Several aspects of the Sabbatino opinion reflect the Court's deliberate rejection of not only the form, but also the underlying substance of a conflicts view of the act of state doctrine. First, the Court meticulously avoided both options open to it under conflicts rules, choosing neither to validate nor to invalidate the Cuban act. It would have had to take a position on this question if it had performed its normal judicial function of applying Cuban, U.S. or international law to resolve the dispute. Yet the Court was insistent on precisely this point, describing its application of the act of state doctrine as a refusal even to "engage[] . . . in the task of passing on the validity" of that act. n168 A refusal to engage cannot be read as a validation of the foreign law as law to be applied as a rule of decision by U.S. courts. The Court's emphasis on this characterization of its action is particularly striking in

light of the unusual procedural posture of Sabbatino. Because the sugar broker Farr, Whitlock had breached its renegotiated contract with the Cuban government in turning over the sugar proceeds to a New York receiver, Banco Nacional had to assert the act of state doctrine as an affirmative ground for recovery. The Sabbatino Court was thus ultimately obliged to hold that the Cuban decree must be "presumed valid," n169 such that [*1951] it could in fact serve as a rule of decision directing the return of the proceeds to the plaintiff. Although this was necessarily an irrebuttable presumption, the Court repeatedly distinguished between actual and "presumed" validity. n170 Thin as this distinction may seem, the Court's doctrinal gymnastics allowed it to avoid the positive endorsement of the Cuban decree and the entire Cuban legal and political system that would have flowed from an application of Cuban law on ordinary conflicts principles. n171

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n168 Id. at 423.

n169 See id. at 437, 438-39.

n170 The amicus curiae brief submitted by the Solicitor General in Sabbatino makes precisely the same distinction, claiming that the act of state doctrine "requires the courts to assume the regularity of an established legal title." Brief for the United States as Amicus Curiae at 24, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (No. 63-16) [hereinafter Solicitor General's Brief] (emphasis added).

n171 Both Falk and Henkin later agreed that the Court had not in fact found the Cuban expropriation valid. See Falk, supra note 107, at 23; Henkin, Foreign Affairs Power, supra note 142, at 826-27. If the Hickenlooper Amendment had not intervened, the lower court could have ordered the assets returned to plaintiff by ruling only that Farr, Whitlock had breached its contract with the Cuban government, thereby technically reserving judgment on the logically prior question of valid title. In most act of state cases, however, the defendant is likely to be asserting the act of state doctrine, thereby allowing the court to apply the Sabbatino version of the doctrine and dismiss.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Second, the Court refused to adopt an understanding of the conflicts system that had been custom-designed to support the Sabbatino result. In an article published in 1961, Richard Falk developed a sophisticated argument supporting application of the doctrine to the facts of Sabbatino while retaining a conflicts approach. n172 He characterized conflicts rules as a "horizontal international legal order" in contradistinction to the traditional "vertical" order nominally imposed by public international law. Horizontal norms are procedural rules that stabilize and quiet the international system by institutionalizing mutual deference and respect among widely diverse nations. The act of state doctrine, in Falk's view, is just such a norm: a rule of deference requiring the courts of one nation to respect the value judgments of other nations concerning all questions other than those involving a fundamental core of human rights. As such, it is entitled to application even in the face of a violation of a particular substantive rule of public international law. n173

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n172 See Falk, supra note 82, at 115-38; Richard A. Falk, The Case of Banco Nacional de Cuba v. Sabbatino Before the Supreme Court of the United States, 9 How. L.J. 116, 125-26 (1963); Falk, supra note 77, at 7-10, 24, 29-31.

n173 See Falk, supra note 77, at 31-37.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The norms of Falk's order were mutual respect and accommodation. This description could indeed be easily applied to the traditional system of conflicts of law. But Falk would have vastly enhanced the scope and stretch of this system to accommodate the flowering pluralism of the rapidly de-colonizing and ideologically charged post-1945 world. Domestic courts would defer to and where necessary apply foreign laws in the service of a global legal order, eliminating public policy exceptions and universalizing comity. The Supreme Court stopped [*1952] well short of taking such a step. It reached Falk's result, but with a very different rationale. n174

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n174 Richard Lillich later claimed that Justice Harlan borrowed Falk's thesis wholesale in the Sabbatino opinion. See Richard B. Lillich, Foreword to Richard A. Falk, The Role of Domestic Courts in the International Legal Order at vii (1964). The opinion cites Falk as rebutting the proponents of the conflicts view and the accompanying international law and public policy exceptions. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 424 n.22 (1964). Various of the Court's arguments about the impact of its decision on the international system also parallel Falk's points. For instance, the Court concluded that "both the national interest and progress toward the goal of establishing the rule of law among nations are best served by maintaining intact the act of state doctrine in this realm of its application." Id. at 437. But Justice Harlan's opinion departs fundamentally from what Falk would undoubtedly have regarded as his central point: the building and stabilizing of an international order on a foundational principle of deference to difference as a rule of law that would permit the flourishing of many widely diverse and presumptively equal modes of economic and political development. The only deference shown in Sabbatino was not to the foreign state, but to the Executive. Indeed, in an article published just after Sabbatino, Falk himself reproached the Court for resting the doctrine on "internal deference" (the separation of powers rationale) rather than "external deference" (the conflicts rationale). Richard A. Falk, The Complexity of Sabbatino, 58 Am. J. Int'l L. 935, 947 (1964).

Against this backdrop, Harold Koh has recently suggested that the Sabbatino majority reflected a coalition between "the judicial restraint and anticolonialist elements on the Court." Harold H. Koh, Transnational Public Law Litigation, 100 Yale L.J. 2347, 2362 (1991). This explanation may indeed account for the mustering of individual votes, but the opinion nevertheless had to be written, and could still have been written combining Falk's anticolonialist rationale with the importance of taking Executive views into account -- a combination that on the facts of Sabbatino would have led to the same result. The question thus remains why the Court instead insisted on substituting an entirely different separation of powers rationale for the doctrine.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The Court's recharacterization of the act of state doctrine as a corollary of the principle of separation of powers rested on its perception of the limits of its own competence. This perception, in turn, flows naturally from a deep intuition about the limits of law itself. If indeed the Court could not reach the substantive result it sought -- allowing the Cuban act to stand -- consistently with its understanding of the assumptions underpinning the application of foreign law, then it could not, in effect, resolve the dispute.

B. The Sabbatino Version of the Act of State Doctrine as a Line of Demarcation Between the Liberal Zone of Law and the Nonliberal Zone of Politics

For many, the above analysis of Sabbatino may seem to beg a prior question. Why was the Sabbatino Court unwilling to invalidate the Cuban act in the first place? Even accepting that the Court somehow felt that it could not comfortably apply Cuban law as law, why should it feel such inhibitions about applying international law, or, above all, U.S. law? The liberal internationalist answer is that the Court's delimitation of judicial competence was simultaneously a tacit line of demarcation [*1953] between two different groups of states: those whose transnational legal relations are governed by ordinary conflicts principles and those whose relations must be governed primarily by the political branches. Viewed in this light, the refusal to apply either the international law exception or the public policy exception to invalidate the Cuban act can be understood as implicit recognition that law cannot operate absent a minimum consensus on common values, principles and institutions.

The Court was explicit about the need for such consensus as a precondition for its invocation of the international law exception. n175 It reserved the possibility of an international law exception to the act of state doctrine in cases involving a "greater . . . degree of codification or consensus concerning a particular area of international law." n176 It recognized further that such consensus must rest on a deeper social and political consensus. Justice Harlan observed that the disagreement between the parties over the international legal standard governing compensation for expropriation "reflects an even more basic divergence." n177 He identified the underlying clash as "between the national interests of capital importing and capital exporting nations and between the social ideologies of those countries that favor state control of a considerable portion of the means of production and those that adhere to a free enterprise system." n178 There, in appropriately neutral judicial language, were the battle lines of both the Cold War and the struggle of the Third World against the First World. East versus West, North versus South. n179

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n175 See supra note 145 and accompanying text.

n176 Sabbatino, 376 U.S. at 428.

n177 Id. at 430 (Harlan, J.).

n178 Id.

n179 Interestingly, the Court took pains to point out that it did not "mean to say that there is no international standard in this area; we conclude only

that the matter is not meet for adjudication by domestic tribunals." Id. at 429 n.26. Its analysis here is thus precisely analogous to my characterization of its refusal to apply Cuban law as "law." It did not deny the existence of a foreign law, but concluded that the lack of a minimum underlying consensus between the two states in question precluded it from carrying out its normal function of applying that law.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The Sabbatino Court did not articulate its assumptions so clearly with respect to domestic law. Beneath the surface, however, the opinion reflects a similar analysis regarding the operation of the conflicts system, by tacitly acknowledging that the divergence of the principles and values informing domestic legal systems can grow so wide as to foreclose the application of the normal rules governing both the application and non-application of a foreign law. In this context, the Court's refusal to adopt Falk's conception of a global conflicts system that institutionalizes mutual deference and respect regardless of internal divergence becomes a recognition of the limits of a "zone of law" in which courts are the principal actors. Relations outside this zone must be conducted by political actors.

[*1954] But which states fall into which zone? The answer emerges from the act of state cases themselves. These cases suggest that the line has shifted over time. The early cluster of cases -- Underhill, American Banana, Oetjen and Ricaud -- are equally susceptible of two interpretations. On the one hand, given that they all involve the acts of emerging governments subsequently recognized and approved of by the United States, the decision to let the foreign act stand can be understood as a post hoc decision to recognize the validity of the act under the foreign law in a fashion consistent with ordinary conflicts principles. On the other hand, the Court could have been implicitly distinguishing between established states and emergent states, states that achieved objectives by passing laws and states that exercised authority through the ad hoc acts of individuals struggling to become government officials. This second interpretation would stress the elements in these cases emphasizing the desirability of diplomatic resolution of the underlying dispute. On this reading, instead of tacitly admitting the states in question into the zone of states whose legal relations are regulated by ordinary conflicts principles, these cases too should be understood as drawing a line between two categories of states: those states with which judicial resolution of private disputes is possible and those states with which only the Executive can treat.

Regardless which of these two interpretations of the early cases is preferred, the twentieth century progression of cases involving acts by communist and fascist states supports the contention that over time this line has increasingly become the line between liberal and nonliberal states. It has become a more sharply defined line between those states that routinely apply but periodically reject each other's laws and those states whose laws are beyond the realm of judicial competence to apply. By 1964 the number of liberal states in the international system had substantially increased, and the differences between liberal and nonliberal states had grown dramatically starker. More specifically, by 1964 the zone of legitimate difference created by the public policy exception could be reasonably understood as a zone in which certain substantive political and economic rights were guaranteed. A court's willingness to put itself in the place of a foreign court could reasonably be conditioned on certain assumptions about the rule of law. Further, the

assumption of long-term and frequent interaction among states could reasonably be linked to ability to participate in a liberal international economy. In turn, this increasing political convergence and economic interdependence had begun to undermine formerly rigid territorial distinctions, making it harder to defer to foreign law as a rule applied solely in the foreign states and increasing the discretion of judges to determine when and how such a law should be applied in the transnational context. n180

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n180 An analogy here may be drawn to the rise of "interests analysis" in domestic U.S. conflicts of law, displacing formal territorial rules. Surely part of the apparent obsolescence of categorization based on territorial boundaries resulted from the increasing integration of a national economy.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*1955] Against this backdrop, the Sabbatino version of the act of state doctrine can be interpreted as a doctrine governing nonliberal acts of nonliberal states, acts that a liberal court can neither invalidate nor validate by application of a foreign law. The status of these acts depends thus not only on their specific character but on the character of the state that issues them -- its status outside the minimum consensus required for the operation of a system of conflicts of law governed by general pluralist principles. The limits of this consensus in turn describe the boundary between the zone of law and the zone of politics.

In practice, the actual boundary between these two zones is considerably less monolithic than this analysis might suggest. Even in 1964, for example, not all Cuban laws would necessarily have been deemed to violate U.S. public policy in the first instance. It is quite possible, for instance, that a U.S. court might have chosen to apply Cuban family law in a family dispute, or Cuban tort law in a tort action, on a finding that such laws did indeed fall within the zone of legitimate difference. n181 Overall, however, other acts will be found to violate U.S. public policy and yet be allowed to stand. Here the nonliberal characteristics of the acting state are a good proxy for the limits of a legal solution. The actual outcome in such cases will depend on a court's perception of its role, if any, in the zone of politics.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n181 Four years after Sabbatino, the Court of Appeals of New York applied the act of state doctrine to bar review of the validity of Cuban currency controls. The court specifically addressed the question whether the currency controls in question violated international law, and concluded that currency controls had been imposed "as the exigencies of international economics have required . . . by capitalist countries and communist countries alike, by the United States and its allies as well as by those with whom our country has had profound differences." French v. Banco Nacional de Cuba, 242 N.E.2d 704, 715 (N.Y. 1968). Although the court purported to adopt the Sabbatino version of the act of state doctrine, its analysis was completely consistent with application of Cuban law on a conflicts rationale.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

C. The Preservation of Judicial Autonomy in the Zone of Politics

If, by definition, the zone of politics begins where the ordinary judicial role ends, should not a court confronted with a case in the zone of politics simply look to the political branches for guidance? Here begins a debate about judicial autonomy in the zone of politics. On one side is the Bernstein exception: apply the act of state doctrine to bar review of the foreign act unless the political department states that it has no objection to adjudication of its validity. Here the ideological hostility that often conditions or even fuels a confrontation between liberal and nonliberal states may lead the political branches -- not to mention individual judges disposed to act as political actors -- to favor confrontation with the foreign state. On the other side, as predicted by [*1956] the liberal internationalist model, considerations of both domestic and international legitimacy lead judges faithful to the liberal rule of law to resist such a course. Over all, Sabbatino and its progeny in the Supreme Court bear out this prediction, but these two countervailing forces remain in tension.

Sabbatino stands for the proposition that delimitation of judicial competence is not the same thing as deference to the Executive. It is rather an expression of judicial preference for a political solution -- on the judiciary's terms and under carefully specified conditions. The Executive actually supported the result reached by the Court in Sabbatino. The Solicitor General filed an amicus brief recommending that "no exception should now be made to the act of state doctrine for acts allegedly in violation of 'international law.'" n182 To take this position the government first had to explain that the court of appeals had actually misconstrued earlier communications from the Legal Adviser as "Bernstein letters" approving adjudication in the case. n183 The government now contended that those communications were intended only as a statement of "no comment" on pending litigation, and that in fact the Executive supported reversal of the lower court's decision. n184

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n182 Solicitor General's Brief, supra note 169, at 25.

n183 See id. at 39.

n184 See id. at 40-41.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Much of Justice Harlan's opinion tracks arguments made in the Solicitor General's brief. However, at no point in the section of the opinion devoted to the act of state doctrine does the Court ever mention the position taken by the Executive. n185 On the contrary, the Court explicitly states that it is not ruling on the validity of the Bernstein exception and makes clear that it itself is deciding that the matter under dispute is better suited to political than legal resolution. n186

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n185 At an earlier point in the opinion, while discussing the question of sovereign immunity, the Court does mention that the Executive supports application of the act of state doctrine. Banco Nacional de Cuba v.

Sabbatino, 376 U.S. 398, 412 (1964).

n186 See id. at 419-20.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Both First National City Bank v. Banco Nacional de Cuba n187 and Alfred Dunhill of London, Inc. v. Cuba n188 reflect an ongoing struggle between the majority and the dissent over the issue of judicial autonomy. In First National City Bank the Legal Adviser called for judicial deference on the legal question of whether or not to adjudicate. In a letter to the Supreme Court, he argued first, as a general proposition, that "where the Executive publicly advises the Court that the act of state doctrine need not be applied, the Court should proceed to examine the legal issues raised by the act of a foreign sovereign within its own territory as it would any other legal question before it"; n189 and second that on the particular facts of the case before the Court -- a counterclaim against [*1957] the Cuban government -- the act of state doctrine should not apply. n190 In endorsing the Bernstein exception, the plurality reinterpreted the act of state doctrine as based entirely on a judicial recognition of the "primacy of the Executive in the conduct of foreign relations" and on a corresponding desire to avoid interference with that function: "[W]here the Executive Branch . . . expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts." n191

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n187 406 U.S. 759 (1972).

n188 425 U.S. 682 (1976).

n189 406 U.S. at 764.

n190 See id.

n191 Id. at 767-68.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

In most cases, if the Executive bothers to take a position it is because some political issue is at stake. In other words, the Executive says it sees no obstacle to adjudication because it wants adjudication, not because it is genuinely indifferent. Moreover, as the four dissenting Justices in First National City Bank recognized, it is unlikely to be indifferent to the outcome of this adjudication. n192 Executive foreign policy-makers may decide, for instance, that judicial dispute resolution will serve the nation's political ends by confronting the opposing state, albeit on a piecemeal, ad hoc basis. n193 In this scenario, legal confrontation effectively becomes the continuation of politics by other means; the judiciary becomes the arm of the Executive in implementing the nation's foreign policy. In such cases the act of state doctrine functions as an instrument of Executive-judicial confrontation of the foreign state, in which considerations of international politics produce a specific legal result.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n192 See id. at 783-85 (Brennan, Stewart, Marshall, and Blackmun, JJ., dissenting).

n193 In lieu of or perhaps in addition to undertaking a diplomatic initiative, the Executive might also conclude either that (1) contrary to the judiciary's determination, the dispute is in fact more amenable to legal than political resolution, or (2) that both branches are equally competent, suggesting that judicial resolution of individual disputes should be allowed to proceed contemporaneously with efforts by the Executive. However, most cases appear to fall in the category described in the text.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Six members of the Court rejected the Bernstein exception on precisely this ground. Justice Douglas concurred with the plurality on an entirely different ground, but agreed with Justice Brennan that the Executive could not mandate judicial resolution of the underlying dispute. n194 For Justice Powell, allowance of such an exception "would require the judiciary to receive the Executive's permission before invoking its jurisdiction." n195 He thought instead that the courts should require a "show[ing]" of a conflict between the "roles of the judiciary [*1958] and the political branches." n196 The four dissenters, led by Justice Brennan, insisted on making their own determination of the relative limits of Executive and judicial competence on a particular set of facts. n197 This assessment included a judicial prognostication of the "possible consequences to the conduct of our foreign relations." n198 They rejected categorically a vision of the doctrine "as a judicial aid to the Executive to avoid embarrassment to the political branch in the conduct of foreign relations." n199 They also understood quite clearly that the Executive position was motivated by a keen political interest in having the Court invalidate the foreign act. n200 Refusing this role, they lambasted the Executive for "politiciz[ing] the judiciary." n201

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n194 See 406 U.S. at 772 (Douglas, J., concurring).

n195 Id. at 773 (Powell, J., concurring). Powell nevertheless agreed that the doctrine should not be applied "[u]nless it appears that an exercise of jurisdiction would interfere with delicate foreign relations conducted by the political branches." Id. at 775 (Powell, J., concurring). He thus sided with the plurality concerning the meaning and purpose of the doctrine, but disagreed as to when it should be applied.

n196 Id. at 776 (Powell, J., concurring).

n197 Adoption of the Bernstein exception "would require us to abdicate our judicial responsibility to define the contours of the act of state doctrine so that the judiciary does not become embroiled in the politics of international relations." Id. at 778 (Brennan, J., dissenting).

n198 Id. (Brennan, J., dissenting).

n199 Id. at 777 (Brennan, J., dissenting).

n200 The dissenters acknowledged that the Sabbatino rationale for the doctrine might not hold in cases "where the Executive expressly stipulates that domestic foreign policy interests will not be impaired however the court decides the validity of the foreign expropriation." Id. at 783 (Brennan, J., dissenting). This would be the traditional domestic scenario in which a sharp line could be drawn between legal and political issues, allowing a court to proceed with its normal function. Such a case would presuppose Executive indifference to the result, whereas in the case before the Court the Executive clearly expected and desired the invalidation of the foreign act as a means of protecting the growing number of U.S. owners of property expropriated by foreign governments and subsequently subject to claims by such governments for sums owed in U.S. courts. See id. (Brennan, J., dissenting). The United States argued in an amicus brief in First National City Bank: "'By disregarding [the] statement of Executive policy involving foreign investment by American firms, the court below has seriously restricted the capacity of the government to assist American investors in securing prompt, adequate and effective compensation for expropriation of American property abroad.'" Id. at 784 n.7 (Brennan, J., dissenting) (quoting Solicitor General's Brief, supra note 170, at 3).

n201 Id. at 790 (Brennan, J., dissenting). The dissenters further attempted to hand the ball back to the Executive as "a constituent of the international law-making community." Id. (Brennan, J., dissenting). Emphasizing the Sabbatino distinction between the Executive as advocate of a particular rule of international law and the judiciary as adjudicator applying legal principles based on a consensus, they concluded that the Bernstein exception "countenances an exchange of roles between the judiciary and the Executive." Id. at 791-92 (Brennan, J., dissenting). As a parting shot, the dissenters reminded the Court of the claim in Sabbatino that advocating a role for U.S. courts in formulating international law manifests the "'sanguine presupposition that the decisions of the courts of the world's major capital exporting country and principal exponent of the free-enterprise system would be accepted as disinterested expressions of sound legal principle by those adhering to widely different ideologies.'" Id. at 793 (Brennan, J., dissenting) (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 434-35 (1964)). The limits of the liberal realm could not be more clearly delineated.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The struggle over the "commercial acts" exception in Dunhill n202 can be understood in much the same way. In a letter to the Court in [*1959] Dunhill, the Legal Adviser argued that the act of state doctrine should not be applied to "commercial" acts of the foreign sovereign because a sovereign acting in a commercial capacity sheds its uniquely sovereign authority and takes on the characteristics of a private individual. n203 Four members of the Court adopted the exception, on the same rationale for the doctrine advanced by the plurality in First National City Bank. n204 The syllogism was as follows: the purpose of the doctrine is to prevent embarrassment to the Executive branch in the conduct of foreign relations; n205 the Executive now approves the adjudication of commercial acts; n206 such acts thus need no longer be recognized as acts of state. n207 In one sense this result could be understood as the application of a generalized Bernstein exception, adopting the Executive view as to a whole class of cases.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n202 Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682 (1976).

n203 The content of this letter, which was technically addressed to the Solicitor General, is discussed in the opinion itself, see id. at 696-97, and reprinted in full as Appendix 1 to the opinion. See supra note 118. The Legal Adviser also added his view, in response to the Court's request, "that if the Court should decide to overrule the holding in Sabbatino so that acts of state would thereafter be subject to adjudication in American courts under international law, we would not anticipate embarrassment to the conduct of the foreign policy of the United States." 425 U.S. at 710 app. 1.

n204 See 425 U.S. at 697-98 (White, J., plurality for Part III).

n205 See id. at 697.

n206 See id. at 697-98.

n207 See id. The four dissenters from First National City Bank, this time led by Justice Marshall, again expressed their distaste for following the Executive lead concerning whether the doctrine should or should not apply. They also disallowed the commercial acts exception based on the distinction between sovereign immunity, a jurisdictional doctrine, and act of state, a prudential doctrine akin to the political question doctrine. See id. at 726-27 (Marshall, J., dissenting). The dissent refocused attention on the underlying ideological quarrel in the case, pointing out that Cuba's "commercial act" -- the repudiation of a debt legally owed to a U.S. importer -- grew out of Cuba's initial confiscation of the tobacco properties of its nationals. See id. at 729-30 (Marshall, J., dissenting).

Justice Marshall also seems to describe the doctrine as a species of conflicts-of-law doctrine, since he says "the act of state doctrine merely tells a court what law to apply to a case." Id. at 726 (Marshall, J., dissenting). However, his subsequent analysis undercuts this assertion, and his footnote to Richard Falk for the proposition points to a much more subtle and unorthodox understanding of the doctrine as a conflicts rule. See id. at 726 n.11 (Marshall, J., dissenting).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

On paper, the government and the plurality did indeed have strong intellectual and practical reasons to urge the creation of a commercial acts exception. The State Department had recognized a similar distinction in the field of sovereign immunity since 1952, recommending a grant of immunity only for "claims arising out of governmental activities" (de jure imperii), as contrasted with "claims arising out of activities of a kind carried on by private persons" (de jure gestionis). n208 And as the plurality observed, the growing role of foreign sovereigns in [*1960] "the international commercial market" increased the "potential injury to private businessmen -- and ultimately to international trade itself" of allowing foreign sovereigns to escape "the rule of law." n209 Further, international law "governing the commercial dealings of private parties in the international market" is readily discernible and easily applied. n210 The "commercial acts" exception in the Foreign Sovereign Immunities Act, n211 passed in 1976 and in progress throughout the Dunhill

litigation, directly and visibly supported this image of a network of rules and principles protecting private expectations among the citizens of freely trading states.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n208 See Restatement (Third), supra note 102, @ 451. The document setting forth this view is popularly known as the "Tate Letter," and is reprinted as Appendix 2 to Dunhill, 425 U.S. at 711 app. 2.

n209 Dunhill, 425 U.S. at 703.

n210 Id. at 704.

n211 28 U.S.C. @@ 1602-1611 (1988).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Nevertheless, a majority of the Court refused to extend such an exception as an explicit political means of punishing or confronting nonliberal states. n212 This refusal had much less to do with the merits of subjecting commercial acts of foreign sovereigns to review than with a strong sense that the government and the plurality were using a commercial acts exception solely as a device to circumvent Sabbatino and deal Cuba an important foreign policy blow. The strong arguments for the commercial acts exception thus stand as a testament to the strength of the commitment on the part of these five Justices to preserving their independence from the Executive.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n212 Justice Stevens refused to concur in adopting the commercial acts exception. See 425 U.S. at 715 (Stevens, J., concurring).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Fourteen years later, in Kirkpatrick, a considerably more conservative court similarly reached the result urged by the government but rejected the reasoning proposed to get there. The government wished to leave open the possibility of using the doctrine to block adjudication even of a case involving only the motives of a foreign official, should the Executive deem such an action necessary for the conduct of the nation's foreign affairs. Justice Scalia responded with an absolute rule, holding that regardless of the Executive's position, the act of state doctrine could not apply to bar review of a foreign act where the validity of that act was not directly challenged. n213

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n213 See W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l, 493 U.S. 400, 408-10 (1990) (Scalia, J.).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

This result is consistent with the liberal internationalist model, which predicts that the courts of liberal states will seek to safeguard their autonomy even at the cost of forgoing their normal adjudicatory function. They

themselves can determine when the limits of that function, and by implication, the limits of law in the international realm, have been reached, and can voluntarily cede their place to the political branches. Yet the model also recognizes the existence of strong forces pushing the judiciary toward allowing itself to be used as a means of confronting the foreign state. In all three of the Supreme Court act of [*1961] state cases since Sabbatino, the result has matched the result sought by the Executive even when that result runs counter to a baseline perception of the limits of law and hence of judicial competence. Which of these two competing impulses will triumph in a particular case depends on a more detailed set of considerations laid out in the next section. In the aggregate, however, a liberal internationalist interpretation of the act of state doctrine predicts that in cases involving nonliberal states the tension between judicial autonomy and an inclination to allow the Executive to dictate the result will continue.

IV. A LIBERAL INTERNATIONALIST ANALYSIS OF THE ACT OF STATE DOCTRINE IN THE LOWER COURTS

Even if the liberal internationalist model provides a useful interpretation of the act of state doctrine that explains its evolution in the Supreme Court, the predictive value of the model remains unclear. Does identification of a state as liberal or nonliberal help explain and predict the outcome in a particular case involving that state in which the act of state doctrine is raised? To answer this question, I examined approximately seventy lower court act of state cases decided after Sabbatino, n214 following Michael Doyle's classification of the states involved as liberal or nonliberal. n215

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n214 In selecting cases to be analyzed, I looked for any case in which the act of state doctrine had been raised as either a defense or, occasionally, as an affirmative ground for relief, and addressed by the court in reaching its decision.

n215 See Doyle, Liberal Legacies, supra note 1, at 209-12. In characterizing specific states as liberal or nonliberal, Doyle refined the basic criteria presented supra notes 15-17 and accompanying text. He also took into account the breadth of male suffrage, insisting that it be 30% or over or open to achievement by certain classes of citizens, and specified that female suffrage must be granted within a generation of being demanded. See Doyle, Liberal Legacies, supra note 1, at 212 n.(a). Finally, he looked for internal sovereignty, particularly over such matters as the military and foreign affairs, and imposed a stability requirement specifying that governments have been in existence for at least three years. See id. This model is highly simplified, as will be discussed further below, but it at least provides a starting point for analysis.

The cases I examined include the following, each accompanied by a parenthetical identification of the country involved (if not a party to the case) and its characterization by Doyle as liberal (L) or nonliberal (N): Lamb v. Phillip Morris, Inc., 915 F.2d 1024 (6th Cir. 1990) (Venez., L), cert. denied, 111 S. Ct. 961 (1991); Liu v. People's Republic of China, 892 F.2d 1419 (9th Cir. 1989) (N), cert. dismissed, 111 S. Ct. 27 (1990); F. & H.R. Farman-Farmaian Consulting Eng'rs Firm v. Harza Eng'g Co., 882 F.2d 281 (7th Cir. 1989) (Iran, N), cert. denied, 110 S. Ct. 3301 (1990); Galu v. Swissair,

873 F.2d 650 (2d Cir. 1989) (Switz., L); Republic of the Phil. v. Marcos, 862 F.2d 1355 (9th Cir. 1988) (L), cert. denied, 490 U.S. 1035 (1989); Bandes v. Harlow & Jones, Inc., 852 F.2d 661 (2d Cir. 1988) (Nicar., N); Remington Rand v. Business Sys., Inc., 830 F.2d 1260 (3d Cir. 1987) (Nether., L); O.N.E. Shipping, Ltd. v. Flota Mercante Grancolombiana, S.A., 830 F.2d 449 (2d Cir. 1987) (Colom., L), cert. denied, 488 U.S. 923 (1988); Banco Nacional de Cuba v. Chemical Bank N.Y. Trust Co., 822 F.2d 230 (2d Cir. 1987) (Cuba, N); West v. Multibanco Comermex, S.A., 807 F.2d 820 (9th Cir.) (Mex., L), cert. denied, 482 U.S. 906 (1987); Republic of Phil. v. Marcos, 806 F.2d 344 (2d Cir. 1986) (L), cert. dismissed sub nom. Anchor Holdings, N.V. v. Republic of Phil., 480 U.S. 942, cert. denied sub nom. New York Land Co. v. Republic of Phil., 481 U.S. 1048 (1987); Grass v. Credito Mexicano, S.A., 797 F.2d 220 (5th Cir. 1986) (Mex., L), cert. denied, 480 U.S. 934 (1987); Riedel v. Bancam, S.A., 792 F.2d 587 (6th Cir. 1986) (Mex., L); Randall v. Arabian Am. Oil Co., 778 F.2d 1146 (5th Cir. 1985) (Saudi Arabia, N); Drexel Burnham Lambert Group Inc. v. Galadari, 777 F.2d 877 (2d Cir. 1985) (Dubai, N); Tchacosh Co. v. Rockwell Int'l Corp., 766 F.2d 1333 (9th Cir. 1985) (Iran, N); Callejo v. Bancomer, S.A., 764 F.2d 1101 (5th Cir. 1985) (Mex., L); Braka v. Bancomer, S.N.C., 762 F.2d 222 (2d Cir. 1985) (Mex., L); Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516 (2d Cir.) (Costa Rica, L), cert. dismissed, 473 U.S. 934 (1985); Airline Pilots Assoc. Int'l v. Taca Int'l Airlines, S.A., 748 F.2d 965 (5th Cir. 1984) (El Sal., N), cert. denied, 471 U.S. 1100 (1985); Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984) (Hond., N), vacated by 471 U.S. 1113 (1985); United States v. Bank of Nova Scotia, 740 F.2d 817 (11th Cir. 1984) (Can., L), cert. denied, 469 U.S. 1106 (1985); Garcia v. Chase Manhattan Bank, N.A., 735 F.2d 645 (2d Cir. 1984) (Cuba, N); DeRoburt v. Gannett, 733 F.2d 701 (9th Cir. 1984) (Nauru), cert. denied, 469 U.S. 1159 (1985); Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Eth., 729 F.2d 422 (6th Cir. 1984) (N); Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404 (9th Cir. 1983) (Umm Al Qaywayn, N), cert. denied, 464 U.S. 1040 (1984); Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030 (9th Cir.) (Iran, N), cert. denied, 464 U.S. 849 (1983); Associated Container Transp. Ltd. v. United States, 705 F.2d 53 (2d Cir. 1983) (Austl., N.Z., L); Williams v. Curtiss-Wright Corp., 694 F.2d 300 (3d Cir. 1982) (Arg., Phil., N, Sing., L); Compania de Gas de Nuevo Laredo v. Entex, Inc., 686 F.2d 322 (5th Cir. 1982) (Mex., L), cert. denied, 460 U.S. 1041 (1983); Kunstsammlungen zu Weimar v. Elicofon, 678 F.2d 1150 (2d Cir. 1982) (G.D.R., N); First Nat'l Bank of Boston v. Banco Nacional de Cuba, 658 F.2d 895 (2d Cir. 1981) (Cuba, N), cert. denied, 459 U.S. 1091 (1982); Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875 (2d Cir. 1981) (Cuba, N); Empresa Cubana Exportadora de Azucar v. Lamborn & Co., 652 F.2d 231 (2d Cir. 1981) (Cuba, N); International Ass'n of Machinists v. OPEC, 649 F.2d 1354 (9th Cir. 1981) (OPEC, N), cert. denied, 454 U.S. 1163 (1982); Texas Trading & Milling Corp. v. Federal Republic of Nig., 647 F.2d 300 (2d Cir. 1981) (L), cert. denied, 454 U.S. 1148 (1982); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (Para., N); Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371 (5th Cir. 1980) (Dom. Rep.); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979) (N.Z., Can., Japan, Austl., L); Industrial Inv. Dev. Corp. v. Mitsui & Co., 594 F.2d 48 (5th Cir. 1979) (Indon., N), cert. denied, 445 U.S. 903 (1980); Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir.) (Libya, N), cert. denied, 434 U.S. 984 (1977); Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597 (9th Cir. 1976) (Hond., N); United Bank Ltd. v. Cosmic Int'l, Inc., 542 F.2d 868 (2d Cir. 1976) (Pak., Bangl., N); Oliva v. Pan Am Life Ins. Co., 448 F.2d 217 (5th Cir. 1971) (Cuba, N); Johansen v. Confederation Life Ass'n, 447 F.2d 175 (2d Cir. 1971) (Cuba, N); Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706 (5th Cir.) (Cuba, N), cert. denied, 393 U.S.

924 (1968); Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47, 51 (2d Cir. 1965), cert. denied, 382 U.S. 1027 (1966); Faysound, Ltd. v. Walter Fuller Aircraft Sales, 748 F. Supp. 1365 (E.D. Ark. 1990) (Phil., L), appeal dismissed sub nom. Faysound Ltd. v. Falcon Jet Corp., 940 F.2d 339 (8th Cir. 1991), cert. denied, 112 S. Ct. 1175 (1992); Herbage v. Meese, 747 F. Supp. 60 (D.D.C. 1990) (U.K., L), aff'd, 946 F.2d 1564 (1991); Bank Tejarat v. Varsho-Saz, 723 F. Supp. 516 (C.D. Cal. 1989) (Iran, N); Risk v. Kingdom of Nor., 707 F. Supp. 1159 (N.D. Cal. 1989) (L), aff'd sub nom. Risk v. Halvorsen, 936 F.2d 393 (9th Cir. 1991), cert. denied, 112 S. Ct. 880 (1992); United States v. 2,507 Live Canary Winged Parakeets, 689 F. Supp. 1106 (S.D. Fla. 1988) (Peru, L); Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987) (Arg., L); Dayton v. Czechoslovak Socialist Republic, 672 F. Supp. 7 (D.D.C. 1986) (N), aff'd, 834 F.2d 203 (D.C. Cir. 1987), cert. denied, 486 U.S. 1054 (1988); United States v. Evans, 667 F. Supp. 974 (S.D.N.Y. 1987) (Isr., L); Guinto v. Marcos, 654 F. Supp. 276 (S.D. Cal. 1986) (Phil., L); Boland v. Bank Sepah-Iran, 614 F. Supp. 1166 (S.D.N.Y. 1985) (Iran, N); Friedar v. Israel, 614 F. Supp. 395 (S.D.N.Y. 1985) (L); Sharon v. Time, Inc., 599 F. Supp. 538 (S.D.N.Y. 1984) (Isr., L); Central Cartage Co. v. Her Majesty the Queen in Right of Can., 576 F. Supp. 1416 (E.D. Mich. 1983) (L), aff'd, 751 F.2d 384 (6th Cir. 1984); Rasoulzadeh v. Associated Press, 574 F. Supp. 854 (S.D.N.Y. 1983) (Iran, N), aff'd, 767 F.2d 908 (2d Cir. 1985); Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A., 570 F. Supp. 870 (S.D.N.Y. 1983) (Costa Rica, L); Asociacian de Reclamantes v. United Mexican States, 561 F. Supp. 1190 (D.D.C. 1983) (L), aff'd, 735 F.2d 1517 (D.C. Cir. 1984), cert. denied, 470 U.S. 1051 (1985); Frolova v. Union of Soviet Socialist Republics, 558 F. Supp. 358 (N.D. Ill. 1983) (N); Sage Int'l, Ltd. v. Cadillac Gage Co., 534 F. Supp. 896 (D.C. Mich. 1981) (15 countries); Forbo-Giubiasco S.A. v. Congoleum Corp., 516 F. Supp. 1210 (S.D.N.Y. 1981) (Switz., L); American Int'l Group, Inc. v. Islamic Rep. of Iran, 493 F. Supp. 522, 525 (D.D.C. 1980) (N), vacated on other grounds, 657 F.2d 430 (D.C. Cir. 1981); Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980) (N); Libyan Am. Oil Co. v. Socialist People's Libyan Arab Jamahirya, 482 F. Supp. 1175 (D.D.C. 1980) (Libya, N), vacated, 684 F.2d 1032 (D.C. Cir. 1981); Dominicus Americana Bohio v. Gulf & W. Indus., 473 F. Supp. 680 (S.D.N.Y. 1979) (Dom. Rep., L); Outboard Marine Corp. v. Pezetel, 461 F. Supp. 384 (D.C. Del. 1978) (Pol., N); National Am. Corp. v. Federal Republic of Nig., 448 F. Supp. 622 (S.D.N.Y. 1978) (Nig., L), aff'd, 597 F.2d 314 (2d Cir. 1979); Linseman v. World Hockey Ass'n, 439 F. Supp. 1315 (D.C. Conn. 1977) (Can., L); Bokkelen v. Grumman Aerospace Corp., 432 F. Supp. 329 (E.D.N.Y. 1977) (Braz., N); Stroganoff-Scherbatoff v. Weldon, 420 F. Supp. 18 (S.D.N.Y. 1976) (U.S.S.R., N); Rupali Bank v. Provident Nat'l Bank, 403 F. Supp. 1285 (E.D. Pa. 1975) (Bang., N); D'Angelo v. Petroleos Mexicanos, 398 F. Supp. 72 (D.C. Del. 1975) (Mex., L); Occidental of Umm Al Qaywayn, Inc. v. Cities Serv. Oil Co., 396 F. Supp. 461 (W.D. La. 1975) (Umm Al Qaywayn, Sharjah, N); Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971) (Umm Al Qaywayn, Sharjah, Iran, N, U.K., L), aff'd, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950 (1972); Interamerican Ref. Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D.C. Del. 1970) (Venez., L).

Due to considerations of space and simplicity of analysis, I have not tried to take account of all of these cases here, but only to highlight the most important trends.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*1962] The results of this analysis support the predictive power of the liberal [*1963] internationalist model and simultaneously demonstrate a

need to refine it further. To begin with, on the level of individual cases it becomes clear that the liberal-nonliberal distinction is a proxy for a number of more specific economic and political differences between liberal and nonliberal states. Not surprisingly, judges respond not to a subconscious identification of a particular state as "liberal" or "nonliberal," but rather to individualized assessments of the particular economic or political interests at stake on the facts of a given case. Further, the liberal-nonliberal distinction cannot be tied to the application or nonapplication of the act of state doctrine in a particular case, precisely because, as demonstrated above, the doctrine itself can have at least two very different meanings. This problem is compounded by the absence of clear Supreme Court precedents in this area and a wide variance in the level of judicial ability and the range of judicial beliefs across such a large number of cases. n216

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n216 Individual cases and commentators sometimes meld a variety of different theories of the doctrine in bizarre and internally contradictory hybrids. For a review of specific instances of confusion based on a wider range of competing theories of the doctrine than is attempted here, see Dellapenna, supra note 127.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

At one remove from this narrow doctrinal analysis, however, the [*1964] classification of these cases in accordance with the liberal or nonliberal nature of the state in question reveals broader aggregate differences in the particular factors or considerations likely to inform judicial reasoning. Identification of these patterns of difference requires stepping back from the particular question of whether and how the act of state doctrine should be applied and focusing instead on the broader question of whether to reach a result consistent with the application of U.S. law or with the law of a particular foreign state. Within this broader framework, the results of a liberal internationalist analysis of the lower court act of state cases can be summarized as follows:

[SEE ILLUSTRATION IN ORIGINAL]

The predictive power of the liberal internationalist model thus operates by helping to identify a number of intervening variables that can in turn be used to explain or predict the outcome of a specific case. Once the state in question is identified as liberal or nonliberal, one or the other set of factors identified above will come into play. By assessing the content and relative weight of these factors in light of the particular facts and circumstances of the case in question, it should be possible to reach an informed calculation of the probability of a particular result.

These aggregate factors emerged from an analysis of individual clusters of lower court act of state cases within a number of specific categories on either side of the liberal-nonliberal divide. These categories [*1965] and the corresponding analysis of representative cases within them are presented below. To summarize here, in cases involving nonliberal states courts tend to adopt one of two postures. First is explicit delimitation of the bounds of the judicial function, using the act of state doctrine as a rule of demarcation, coupled with rhetorical disapproval of the act in question. The result in these cases is a stated preference for political rather than judicial resolution of the dispute

due to the particular advantages of the political branches in this area. Second is a posture of ideological confrontation, frequently approved and encouraged by the Executive branch. The connection between these two positions is the predominance of political over legal considerations, leading the courts either to remain true to a narrow definition of the judicial function or to acquiesce in their own political urges or the urging of the Executive toward confrontation in an ongoing ideological struggle.

In cases involving liberal states, by contrast, the judicial posture is consistent either with outright cooperation with the foreign state in question, or with the assertion of U.S. interests over the interests of the foreign state. Courts are important actors on this stage, fully aware of the claims of diplomacy but simultaneously willing to assess and balance the foreign and domestic interests at stake, to elaborate general rules as to how best to accommodate them, and to issue specific judgments. Act of state cases in this category are part of a much broader spectrum of international regulatory cases that suggest more refined applications of the economic dimensions of the liberal internationalist model. n217

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n217 It is impossible to explore those implications here, other than to note that while act of state analysis appears to focus primarily on the political characteristics of liberal states, jurisdiction to prescribe cases point to a greater emphasis on the economic dimensions of liberal internationalist theory, specifically the emphasis on the contribution of economic interdependence to peace.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

A. Challenging the Acts of Nonliberal States

1. A Rule of Demarcation and Disapproval. -- A number of the courts facing acts of state by clearly nonliberal states, such as states in the former socialist bloc, simply cite Sabbatino and reach the same result. n218 Another group links a refusal to adjudicate with an ongoing diplomatic initiative by the Executive. Many of the courts in these cases have devised a variety of ways to express their disapproval of the act in question without actually moving to invalidate it. The overall combination reserves legal judgment while simultaneously permitting the expression of a normative political and moral judgment based on liberal values.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n218 See, e.g., Kunstsammlungen zu Weimar, 678 F.2d at 1159 (doctrine applied to bar review of East German confiscation of artworks formerly belonging to plaintiff); Stroganoff-Scherbatoff, 420 F. Supp. at 21-22 (doctrine applied to bar recovery of artworks "appropriated" by the Soviet government in 1921).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*1966] a. Interference with an Ongoing Executive Foreign Policy Initiative. -- Refusal to adjudicate is substantially easier when the Executive is evidently taking action to settle the dispute. Although the Executive was making no such efforts in Sabbatino itself, the Sabbatino Court nevertheless

emphasized the importance of avoiding embarrassment to the Executive in the context of an ongoing foreign policy initiative. This concern can be distinguished from two other types of "embarrassment" concerns. First is a concern about embarrassment of the foreign sovereign itself, one of the various considerations put forward as general justification for the principle of comity. This concern is not at issue in cases like Sabbatino and lower court cases following Sabbatino in which the State Department itself has directly condemned the foreign sovereign. n219 A second type of embarrassment concern is the broader concept of judicial embarrassment of the Executive by adjudication of any issue touching on foreign affairs. n220 Although the Sabbatino Court adverted to the more general need for judicial sensitivity to protect the autonomy of the political branches in the conduct of foreign affairs, n221 it was more directly concerned with the ways in which a judicial affront to a foreign government could potentially interfere with ongoing diplomatic efforts to achieve a lump-sum settlement of the claims of all similarly situated litigants. n222

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n219 As noted below, the Sabbatino Court repeated the State Department's denunciation of the Cuban expropriation decree. Neither the Executive nor the Court was concerned about embarrassing the Cuban government. See infra note 235 and accompanying text.

n220 The plurality in First National City Bank argued for application of the Bernstein exception on this ground. See First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 765 (1972). The four dissenting Justices argued strenuously that the Sabbatino Court had considered potential embarrassment to the Executive as only one of a long list of considerations informing its decision to apply the act of state doctrine. See id. at 785 (Brennan, J., dissenting). Justice Powell took an intermediate position in his concurrence, indicating that he would be prepared to refrain from adjudication when "an exercise of jurisdiction would interfere with delicate foreign relations conducted by the political branches." Id. at 775 (Powell, J., concurring).

n221 In setting forth its future balancing test for act of state cases, the Sabbatino Court acknowledged that "the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

n222 Specifically, the Court declared:

Piecemeal dispositions of this sort [invalidating acts of a foreign sovereign within its territorial borders] involving the probability of affront to another state could seriously interfere with negotiations being carried on by the Executive Branch and might prevent or render less favorable the terms of an agreement that could otherwise be reached.
Id. at 432.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

International Association of Machinists v. OPEC, n223 a leading act of state case, supports this distinction. The International Association of [*1967] Machinists sued the Organization of Petroleum Exporting Countries n224 for

violation of U.S. antitrust laws by conspiring to sell oil at the highest possible price. The lower court found OPEC immune under the FSIA; the Ninth Circuit preferred not to reach this question on the grounds that even if OPEC were not immune, the exercise of jurisdiction would be "improper" based on the act of state doctrine. n225 In a thoughtful opinion, Judge Choy expounded on the act of state doctrine as the buffer between law and "the peculiar requirements of successful foreign relations." n226 Once again, however, his primary concern was not embarrassment or affront to the Executive per se, but only in the context of an ongoing political effort to resolve a particular problem: n227

When the courts engage in piecemeal adjudication of the legality of the sovereign acts of states, they risk disruption of our country's international diplomacy. The executive may utilize protocol, economic sanction, compromise, delay, and persuasion to achieve international objectives. Ill-timed judicial decisions challenging the acts of foreign states could nullify these tools and embarrass the United States in the eyes of the world. n228
Judge Choy further noted the "extensive documentation of the involvement of our executive and legislative branches with the oil question." n229

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n223 649 F.2d 1354 (9th Cir. 1981).

n224 All OPEC members were either nonliberal or quasi-liberal states. OPEC was organized in 1960 by Iran, Iraq, Kuwait, Saudi Arabia and Venezuela, and subsequently joined by Algeria, Ecuador, Gabon, Indonesia, Libya, Nigeria, Qatar and the United Arab Emirates. See id. at 1355.

n225 See id. at 1361-62.

n226 Id. at 1358.

n227 Summing up his analysis, Judge Choy concludes: "The possibility of insult to the OPEC states and of interference with the efforts of the political branches to seek favorable relations with them is apparent from the very nature of this action and the remedy sought [an injunction prohibiting OPEC states from setting crude oil prices]." Id. at 1361 (emphasis added).

n228 Id. at 1358.

n229 Id. at 1361.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

In these cases the Executive demarche was an informal amalgam of diplomatic efforts. It can also rise to the level of a formal dispute resolution mechanism, such as a bilateral claims tribunal. Several act of state cases involving Iran, for instance, effectively deferred not only to the specific judgments reached by the Iran-United States Claims Tribunal, but also to the larger diplomatic bargain informing those judgments. In Tchacosh Co. v. Rockwell International Corp., n230 a suit by the managing director of an Iranian subcontractor against an American contractor for payment of a debt incurred prior to the Iranian Revolution, the district court and the court of appeals both applied the act of state doctrine to bar examination of a decree by the new Iranian government dissolving the corporation and expropriating its assets,

including [*1968] accounts receivable. n231 According to the Ninth Circuit, a finding by a U.S. court that a debt owed to Tchacosh should be paid to its prerevolutionary manager would directly contradict a prior determination by the Claims Tribunal (in an entirely different suit) that Iran controlled Tchacosh, and thereby "carries the potential for interference with the diplomatic efforts of the Executive." n232 Similar judgments have been reached in act of state cases regarding claims settlements between the United States and Czechoslovakia, n233 and between the United States and the Soviet Union. n234

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n230 766 F.2d 1333 (9th Cir. 1985).

n231 See id. at 1338-39.

n232 Id. at 1338. Closer examination of the facts suggests that the determination by the Claims Tribunal was part of a reciprocal deal whereby claims owed by U.S. corporations to Tchacosh would now be paid to Iran as long as Iran paid out the claims Tchacosh owed to U.S. corporations. In a footnote, the court observed: "It is noteworthy that in Rexnord [the case involving Tchacosh decided by the Claims Tribunal] the Tribunal found Tchacosh liable for obligations to a U.S. company which arose before the government took control." Id. at 1338 n.7. The court added further, seemingly in passing, that "the relations between Tchacosh and Rockwell have a far greater impact upon Iran than upon the United States." Id. at 1338. So they would, as long as the diplomatic deal enforced by the Claims Tribunal stood and Iran was entitled only to the monies owed Tchacosh. If the deal came undone, American corporations such as Rockwell would not have recovered the monies owed them by Iran, in which case the impact would have fallen equally on the United States. As the deal was allowed to stick, however, the real losers ended up being the former owners of the Iranian corporation, who simply paid the price of political upheaval. The court thus essentially ensured that the United States lived up to its part of the bargain, but by abstention rather than by a legal judgment that would have radically violated private commercial expectations. For other cases where U.S. courts have invoked the act of state doctrine to preclude claims by disenfranchised Iranian nationals, see F. & H.R. Farman-Farmaian Consulting Eng'rs Firm v. Harza Eng'g Co., 882 F.2d 281 (7th Cir. 1989) (rejecting extraterritoriality exception to act of state doctrine); Bank Tejarat v. Varsho-Saz, 723 F. Supp. 516 (C.D. Cal. 1989) (act of state doctrine precludes "setoff" and "unclean hands" defenses).

n233 See Dayton v. Czechoslovak Socialist Republic, 672 F. Supp. 7, 12 (D.D.C. 1986). This was a suit arising from the failure of the Communist government to honor the Benes regime's promise of compensation for the expropriation of plaintiff's textile plants. The court observed that the expropriation was by a government of the property of its own nationals, and promptly deferred to an existing political agreement between the United States and Czechoslovakian governments. See id.

n234 See supra notes 62-68 and accompanying text.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

b. Condemning the Foreign Law. -- By explicitly refusing to adjudicate cases involving disputes with nonliberal states as a matter of law, courts applying

the act of state doctrine free themselves to condemn the acts of state at issue as a matter of policy. No legal significance attends such verbal opposition; the impact is purely symbolic. The foreign state subject to the denunciation may be expected to ignore it as a feeble counter-revolutionary protest. Yet a U.S. court giving voice to sentiments it acknowledges it cannot act on is nevertheless speaking for liberal values and publicly branding the foreign state as a violator of those values.

Sabbatino once again provides the prototype for this dual approach. [*1969] In addition to steadfastly avoiding any validation of the foreign law, the Court repeated the State Department's denunciation of the Cuban expropriation as "'discriminatory, arbitrary and confiscatory,'" and "'manifestly in violation of those principles of international law which have long been accepted by the free countries of the West.'" n235

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n235 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 402-03 (1964) (quoting State Dept. Note No. 397 to Cuban Ministry of Foreign Relations (July 16, 1960)). The Sabbatino Court blunted its own denunciation of Cuba's act by acknowledging elsewhere in the opinion the ideological disagreements over the appropriate international law standards governing expropriation of property. See id. at 430; supra note 145. This kind of denunciation thus necessarily falls short of the negative message conveyed by an outright invalidation of the Cuban law. As noted above, this was the Court's compromise in the face of a situation in which it could neither apply nor reject the foreign law consistent with its function as a court in a liberal state.

It is also worth looking at Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir. 1977), in which the court quoted Colonel Mu'ammar al-Qadhafi's proclamation that "'this United States needs to be given a big hard blow in the Arab area on its cold, insolent face . . . .'" Id. at 73. In response, according to the court, the State Department condemned both the seizure and Libya's public statements as "'political reprisal[s] against the United States Government and coercion against the economic interests of certain other U.S. nationals in Libya,'" and flatly declared the taking "'invalid and not entitled to recognition by other states'" under international law. Id. at 73, 77 (quoting A. Rovine, Digest of United States Practice in International Law 1973, at 335). The case was an antitrust action brought by the Hunt brothers against the seven major oil producers for allegedly conspiring to force the Hunt oil company not to settle with Libya on any terms inconsistent with their competitive advantage, thereby preserving the competitive advantage of Persian Gulf oil over Libyan oil. The lower court found that since the damage to Hunt resulted from Libya's seizure of its property, proof of the antitrust claim required proof that the alleged conspiracy caused Libya's action. Such an effort of proof would require "judicial inquiry into 'acts and conduct of Libyan officials, Libyan affairs and Libyan policies,'" an inquiry barred by the act of state doctrine. Id. at 72 (quoting district court opinion, Hunt v. Mobil Oil Corp., 410 F. Supp. 10, 24 (S.D.N.Y. 1975)).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - -

Other courts have been quieter but even more direct. In Frolova v. Union of Soviet Socialist Republics, n236 a challenge to the Soviet government's refusal to allow plaintiff's husband to emigrate, n237 the court applied the act of

state doctrine without hesitation. The final sentence of the opinion, however, neatly couples delimitation with disapproval. "[W]ithout sanctioning the Soviet Union's actions in this case," the court concluded, "they are clearly the actions of a sovereign state and this court will defer from sitting in judgment on them." n238 Another technique is to describe what the result would be on the merits if the act of state doctrine were not found to apply. n239

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n236 558 F. Supp. 358 (N.D. Ill. 1983), aff'd, 761 F.2d 370 (7th Cir. 1985).

n237 Plaintiff sued in tort under U.S. law for loss of consortium.

n238 558 F. Supp. at 364.

n239 In F. & H.R. Farman-Farmaian Consulting Eng'rs Firm v. Harza Eng'g Co., 882 F.2d 281 (7th Cir. 1989), a Seventh Circuit case again applying the act of state doctrine to bar recovery of debts incurred by an American firm to an Iranian corporation prior to the Iranian Revolution, the court considered plaintiff's contention that the extraterritoriality exception to the doctrine should apply. In its description, this exception would "lift [the] bar to suit in cases in which the act of state (1) is confiscatory, and hence contrary to strong American public policy, yet (2) could not be completed within the territory of the foreign sovereign. It is the second element of the exception that is at issue in this appeal; the first is not contested." Id. at 283 (emphasis added). Similarly, in First National Bank of Boston v. Banco Nacional de Cuba, 658 F.2d 895 (2d Cir. 1981), the Second Circuit followed Sabbatino to the letter, rejecting an effort by plaintiff to circumvent the act of state doctrine with a claim of unjust enrichment. The court had no doubt that any expropriation without compensation would be "unjust," but refused on that account to duck the doctrine: "We may not avoid application of the act of state doctrine by simply compartmentalizing the expropriation and narrowing our sights to the precise injustice associated with the taking of a particular asset." Id. at 901; accord Empresa Cubana Exportadora de Azucar v. Lamborn & Co., 652 F.2d 231, 239 (2d Cir. 1981) (admitting that application of act of state doctrine leads to an "inequitable" result).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*1970] 2. Judicial Confrontation of Nonliberal States. -- Following the Supreme Court's lead, a number of lower courts have decided to invalidate the foreign law in cases involving nonliberal states. Many of these cases also similarly reveal a strong element of Executive manipulation of the judiciary as a foreign policy tool. A handful of remaining cases appear to reflect independently motivated ideological confrontation on the part of individual judges. To reach this confrontational result in the wake of Sabbatino, lower courts have typically exploited loopholes in the Sabbatino formulation of the act of state doctrine or relied on a preexisting exception to the doctrine.

a. The Treaty Exception. -- The Sabbatino holding was carefully crafted to leave open the possibility of adjudicating the validity of a foreign act of state under a "treaty or other unambiguous agreement regarding controlling legal principles." n240 The resulting "treaty exception" was first applied to remove the act of state bar to the issuance of a preliminary injunction against Iran in the midst of the hostage crisis, n241 and next to permit adjudication of a

claim by an expropriated U.S. investor against the Provisional Military Government of Socialist Ethiopia. n242 In both instances the interest of the Executive in encouraging litigation was patent. Plaintiffs in the Iranian case filed suit pursuant to an Executive license authorizing a particular class of judicial proceedings against Iran, including the issuance of preliminary relief pending final resolution of the underlying crisis. n243 In the Ethiopian case the Departments of State, Treasury and Justice weighed in directly with an amicus brief urging adjudication under the 1953 United States-Ethiopia Treaty of Amity and Economic Relations. n244 As the Court of Appeals [*1971] observed, "Obviously, the Executive branch feels that an adjudication in this matter is appropriate." n245

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n240 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

n241 See American Int'l Group, Inc. v. Islamic Rep. of Iran, 493 F. Supp. 522, 525 (D.D.C. 1980) (holding that insurance companies may assert right to recover damages due to nationalization of insurance industry in Iran), vacated on other grounds, 657 F.2d 430 (D.C. Cir. 1981).

n242 See Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Eth., 729 F.2d 422, 427-28 (6th Cir. 1984).

n243 For a discussion of the procedural history of the case, see 657 F.2d at 433-34.

n244 See 729 F.2d at 427. The district court had applied the act of state doctrine to bar adjudication; the Executive was intervening on appeal to urge reversal of this result on the basis of the treaty exception. The Kalamazoo Spice court also relied heavily on the result in American International Group. See id. at 426.

n245 Id. at 427.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The radical divergence of values between the United States and both these governments was palpable at the time of suit. n246 Both cases can be understood as the judicial implementation of Executive policy against the foreign sovereign. Indeed, the Iranian decision was subsequently vacated pursuant to a request from the United States that all claims for private judicial relief against Iran be suspended. n247 Further, the treaties in question in both cases were varieties of the standard bilateral "FCN" treaty -- Friendship, Commerce and Navigation. n248 The United States concluded a large number of such treaties after World War II to foster international commerce by codifying specific terms of trade and investment protections for U.S. citizens with foreign interests. Application of the treaty exception can thus also be understood as U.S. insistence, carried forward by its domestic courts, on protection of its commercial interests against states that had previously sought, or at least accepted, membership in a global trading community.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n246 The court in American International Group recounted a litany of complaints against Iran, including its "consistent[ ] and notorious[ ] fail[ure] to honor its duties, responsibilities and obligations" to U.S. banks, its "complete and utter disregard for international law" in seizing American hostages, and the failure of its courts to "meet the international standard of minimum justice." American Int'l Group, Inc. v. Islamic Rep. of Iran, 493 F. Supp. 522, 524-25 (D.D.C. 1980), vacated on other grounds, 657 F.2d 430 (D.C. Cir. 1981). The Kalamazoo Spice court was more restrained, but noted that the nationalization at issue had taken place as part of the Provisional Military Government of Ethiopia's "program to assure that Ethiopian industries would 'be operated according to the philosophy of Ethiopian socialism. . . .'" 729 F.2d at 423.

n247 See American Int'l Group v. Islamic Rep. of Iran, 657 F.2d 430, 433 (D.C. Cir. 1981). This should be compared with the discussion of the treaty exception in Dayton v. Czechoslovak Socialist Republic, 672 F. Supp. 7, 12 (D.D.C. 1986), in which plaintiff sought to enforce the 1946 agreement on claims settlements between the United States and Czechoslovakia. The court concluded that the provision that the two countries would compensate their nationals for property loss did not specify when such property owners became "nationals," and thus was too ambiguous to be applied under Sabbatino. The court deferred to a political resolution settled in 1981 when Congress provided for ex gratia payments to a class of claimants including the Dayton plaintiffs. See id.

n248 For a discussion of the FCN treaties and a sample list of their property protection clauses, see Kalamazoo Spice, 729 F.2d at 426-30. The treaty in American International Group was the bilateral Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, which entered into force June 16, 1957. See 8 U.S.T. 899 (signed Aug. 5, 1955).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

b. Manipulation of the Situs of Intangible Property. -- Even when the Executive has remained silent, courts have sometimes chosen a course of ideological confrontation on their own initiative. The dominant motif in these cases is ideological outrage coupled with a belief that when the judiciary has power to confront the foreign state, it should take the [*1972] opportunity to do so. The result is often the manipulation of legal devices to justify adjudication under U.S. law. As Justice Frankfurter wrote in trying to explain the tangle of contradictory New York and British precedents concerning the effect to be given to Soviet nationalization decrees: "'Situs,' 'jurisdiction,' 'comity,' . . . and other legal ideas that often enough in litigation of a purely domestic nature prove their limitations as instruments for solution or even as means for analysis, were pressed into service for adjudicating claims whose international implications could not be sterilized." n249 Subsequent attempts to use these concepts to dodge the act of state doctrine have proven equally transparent.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n249 United States v. Pink, 315 U.S. 203, 235-36 (1942) (Frankfurter, J., concurring).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The Sabbatino holding was explicitly limited to the taking of property by a foreign sovereign within its own territory. This limitation was consistent with act of state jurisprudence as contemporaneously understood. n250 Acts of state purporting to affect property located in the United States at the time of confiscation were to be given effect "only if they are consistent with the policy and law of the United States." n251 Judge Friendly reaffirmed this limitation on the Sabbatino version of the act of state doctrine in Republic of Iraq v. First National City Bank, n252 decided in 1965, in which he refused to give effect to an ordinance issued by the new Iraqi government purporting to confiscate the former Iraqi monarch's assets in bank accounts located in New York and Canada. n253 The distinction behind this limitation is that with respect to property located in the United States at the time of confiscation, application of the act of state doctrine would make U.S. courts party to the confiscation itself.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n250 See Zwack v. Kraus Bros. & Co., 93 F. Supp. 963, 966 (S.D.N.Y. 1950) ("Our courts do not recognize the confiscatory acts of foreign governments when those acts purort to affect property which was not within the territorial jurisdiction of that government. . . ."), aff'd, 237 F.2d 255, 259 (2d Cir. 1956); Restatement (First) of the Foreign Relations Law of the United States @ 46 (Proposed Official Draft 1962); Albert A. Ehrenzweig, Conflict of Laws @ 48, at 171-72 (1962); see also Blanco v. Pan-American Life Ins. Co., 221 F. Supp. 219, 227 (S.D. Fla. 1963) (refusing to give effect to Cuban decree because defendants' expropriated assets in Cuba bore no relation to cause of action), aff'd in part and rev'd in part, 362 F.2d 167 (5th Cir. 1966); Compania Ron Bacardi, S.A. v. Bank of Nova Scotia, 193 F. Supp. 814, 815 (S.D.N.Y. 1961) (holding that Cuban nationalization law terminating plaintiff standing has no effect because "the assets involved in this litigation are in America"); Naamloze Vennootschap Suikerfabriek "Wono-Aseh" v. Chase Nat'l Bank, 111 F. Supp. 833, 841 (S.D.N.Y. 1953) (refusing to give extra-territorial effect to Netherlands Indies decree affecting securities transferred from New York bank account).

n251 Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47, 51 (2d Cir. 1965) (quoting Restatement (First) of the Foreign Relations Law of the United States @ 46 (Proposed Official Draft 1962)), cert. denied, 382 U.S. 1027 (1966).

n252 353 F.2d 47 (1965).

n253 See id.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Regardless of the merits or logic of the original territorial limitation, n254 [*1973] it has become a major detour around Sabbatino with respect to intangible property. n255 The standard fact pattern of these "situs" cases involves a debt owed by a U.S. entity to the expropriated foreign individual or corporation that is unpaid at the time of the expropriation. n256 The former owner sues to block payment of the debt to the new owners (often described as "interventors") appointed by the expropriating state. Application of the act of state doctrine would result in dismissal of the suit. A determination that the debt was "located" within the United States at the time of the expropriation, however, would permit the court to refuse to recognize the expropriation on

public policy grounds and thus order payment to the original owners. As one commentator noted in an article published contemporaneously with Sabbatino:

[A] disguised application of public policy may be involved in the court's treatment of an expropriation of intangible property, which has an ascribed rather than a physical situs. In such cases the court may strain to find that the property has a situs outside the taking state, and thus to avoid application of the foreign law n257
It is not surprising that such judicial manipulation should continue as a form of resistance to Sabbatino itself. n258

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n254 The claims of territory linger on, often despite all reason. See Kramer, supra note 61, at 184. When faced with a similar problem, Justice Frankfurter asserted point blank: "Corporeal property may give rise to rules of law which . . . even in purely domestic controversies ought not to be transferred to the adjudication of impalpable claims . . . ." United States v. Pink, 315 U.S. 203, 239 (1942) (Frankfurter, J., concurring) (citing Curry v. McCanless, 307 U.S. 357, 363 (1939)).

n255 See Margaret E. Taylor, Note, The Act of State Doctrine: Resolving Debt Situs Confusion, 86 Colum. L. Rev. 594, 601-05 (1986).

n256 See, e.g., Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 685-86 (1976); United Bank Ltd. v. Cosmic Int'l, Inc., 542 F.2d 868, 870-71 (2d Cir. 1976); Tabacalera Severiano Jorge v. Standard Cigar Co., 392 F.2d 706, 707-11 (5th Cir.), cert. denied, 393 U.S. 924 (1968).

n257 Collinson, supra note 102, at 35.

n258 The device most frequently employed by courts engaging in such situs manipulation was a reading of Sabbatino's limitation on judicial competence as based on a determination "that in most [act of state] situations there was nothing the United States courts could do about [the foreign act of state] in any event." Tabacalera, 392 F.2d at 715; accord Maltina Corp. v. Cawy Bottling Co., 462 F.2d 1021, 1027 (5th Cir.) (Cuba) (act of state doctrine does not preclude federal courts from determining whether deprivation of trademark registered in United States violated Fifth Amendment), cert. denied, 409 U.S. 1060 (1972); Bandes v. Harlow & Jones, Inc., 570 F. Supp. 955, 960 (S.D.N.Y. 1983) (Nicaragua) ("[T]he doctrine recognizes . . . that . . . the United States courts are without power to enforce their decrees as they apply to property held extraterritorially . . . .").

This reading mistakes Sabbatino's limitation on judicial competence for recognition of a physical limitation on judicial power, a notion that is as fictitious as the determination of situs itself. On the actual facts of Sabbatino, the Court had only to find for defendant to vitiate the effect of the Cuban confiscation. More generally, plaintiffs bother to bring these types of cases only when there is a possibility of executing a judgment against some assets either in the United States or in a friendly foreign state. The "power" of the foreign government to effectuate its acts is not an abstract, predetermined capacity, but ultimately depends in all these cases precisely on the decision by U.S. courts to give effect to those acts. Thus the basic divergence between Sabbatino and subsequent debt situs cases is the desire on

the part of subsequent courts to render the foreign act ineffective.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*1974] c. Manipulation of the Evidentiary Burden. -- The chief precedent for post-Sabbatino manipulation of the situs exception, Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., n259 also pioneered another mode of judicial confrontation. Plaintiff in Tabacalera was the expropriated Cuban corporation itself, suing to recover a sum owed by an American company for tobacco shipped prior to the Cuban revolution. n260 The district court dismissed the case on the grounds that the Cuban government's appointment of an "interventor" for the corporation was an act of state depriving the former officers, directors and stockholders of the corporation of all rights previously held by the corporation. n261 The Fifth Circuit was determined to distinguish the facts before it from Sabbatino. n262 The court held that notwithstanding its intentions, the Cuban government had failed to authorize its appointed interventor to collect outstanding debts and to cancel or rescind outstanding powers of attorney; moreover, the appointed interventor had in fact failed to accomplish these acts. The court reached this result by placing the burden of proving the performance of these acts on the defendant American company, which failed to offer such proof. This evidentiary ruling permitted connivance between the U.S. creditor and a former business associate to defeat the claim of the new revolutionary government. n263

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n259 392 F.2d 706, 715 (5th Cir.), cert. denied, 393 U.S. 924 (1968).

n260 See id. at 707-11

n261 See id. at 707.

n262 The court recognized immediately that to the extent the facts before it paralleled Sabbatino, it would be obliged to affirm the lower court's result. See id. at 712-13. The court found itself in a particularly difficult bind because international law does not purport to regulate nationalizations without compensation conducted by a government against its own nationals; moreover, the Cuban identity of the plaintiffs meant that technically the United States government had no interest in the case. These refinements of the Sabbatino facts suggest that the Tabacalera court was indeed motivated primarily by ideological hostility.

n263 Similarly, in Sabbatino the purchaser of the sugar was indemnified by the former owner to refuse payment to the Cuban government. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 405 (1964).

The Tabacalera court also distinguished the case before it from Sabbatino on the debt situs question, arguing that for purposes of the act of state doctrine the determination of situs depended on whether the acts of the foreign state "were able to come to complete fruition within the dominion of the [foreign] government." 392 F.2d at 715-16; accord supra note 258.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Ten years later, the Supreme Court borrowed the basics of this maneuver in Dunhill, n264 this time to reach a result explicitly favored by the Executive. Four Justices, as noted above, followed the Executive [*1975] suggestion of a commercial acts exception. But Justice Stevens, the crucial fifth vote, agreed to join only on the theory that the defendant foreign government had failed to prove that the act in question -- the repudiation of a judicially imposed debt -- was an act of state. n265 To reach this conclusion, the majority retroactively shifted the burden of proof onto the defendant, and then concluded on the record below that this burden had not been met. n266

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n264 Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).

n265 See id. at 715 (Stevens, J., concurring).

n266 See id. at 694-95. The Court of Appeals held that there was no evidence that the interventors were "not acting within the scope of their authority as agents of the Cuban government." Menendez v. Saks & Co., 485 F.2d 1355, 1371 (2d Cir. 1973), rev'd sub nom. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976). The Supreme Court found instead that they should be required to prove that they were acting within the scope of their official authority. The Supreme Court emphasized the absence of evidence of a "statute, decree, order or resolution of the Cuban Government" indicating a repudiation of Cuba's sovereign obligations, id. at 695, but was unable to deny that previous act of state cases had accorded act of state status to informal as well as formal acts.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

B. Challenging the Acts of Liberal States

In cases presenting challenges to the laws of liberal states, courts either resolve the case consistently with a norm of cooperation with the foreign state or turn to the standard devices for resolving conflicts of sovereign interests among liberal states: interest-balancing conditioned by reciprocity. When U.S. interests are compatible with the interests of the foreign government in question, or when the foreign government's interests are deemed to outweigh U.S. interests in a particular case, the court will defer directly not to the Executive, but to the foreign state itself -- affirmatively respecting both its laws and its views as to whether the act of state doctrine should or should not be applied. Conversely, however, when U.S. interests are deemed to outweigh the interests of the foreign government, the court will either decline to find a foreign act of state or ignore the act of state doctrine altogether. These outcomes are consistent with the comity-based rationale for the act of state doctrine as a conflicts rule, in which comity is defined as a recognition of both the desirability of cooperation and the likelihood of conflict within a zone of legitimate difference.

Two cases are emblematic of the difference between the fundamental premises underlying the courts' posture in act of state cases involving liberal states. One is Judge Sofaer's opinion in Sharon v. Time, Inc., n267 the widely publicized libel action brought by Israeli general and defense minister Ariel Sharon against Time magazine. Judge Sofaer declined to apply the act of state doctrine to bar adjudication. "That the United States and Israel are close

allies with good relations," he concluded, "is reason to adjudicate this suit rather than to abstain." n268 [*1976] This case might be distinguished on the grounds that neither Israel nor the United States government formally objected to the litigation; on the other hand, their lack of objection proves Sofaer's point that between two liberal allies, adjudication is a fine solution for even a highly politicized dispute. The second case is Republic of Philippines v. Marcos, n269 in which the Philippines government itself, under newly elected President Corazon Aquino, asked the court not to apply the act of state doctrine to bar review of former dictator Ferdinand Marcos' alleged torts. n270 The Ninth Circuit deadlocked for a long time. Its first opinion applied the act of state doctrine but was subsequently withdrawn. n271 Its second opinion, after a rehearing en banc, held that the act of state doctrine did not bar review. n272 Reading between the lines of the majority and the dissent, it appears that here the court went against the carefully expressed wishes of the Executive, or at least moved considerably further in the direction of adjudication than the Executive had recommended. n273 In Sabbatino itself, the Executive expression of support for an affirmative application of the doctrine created a situation in which Executive wishes and judicial instincts concerning the proper delimitation of judicial competence coincided. n274 The Marcos court's decision to adjudicate in the face of an Executive suggestion to the contrary is thus strong evidence of the court's tacit recognition of expanded competence in a case involving a liberal state. n275

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n267 599 F. Supp. 538 (S.D.N.Y. 1984).

n268 Id. at 551. Judge Sofaer based this judgment partly on the practical litigating advantages coincident with this close relationship, such as common membership of the 1970 Hague Evidence Convention. Above all, however, he emphasized the likely absence of diplomatic interference as evidence that the two governments shared a commitment to private dispute settlement through normal judicial channels.

n269 862 F.2d 1355 (9th Cir. 1988), cert. denied, 490 U.S. 1035 (1989).

n270 See id. at 1360-61.

n271 See Republic of Phil. v. Marcos, 818 F.2d 1473, 1481-90 (9th Cir. 1987).

n272 See 862 F.2d at 1361.

n273 The majority opinion quoted the government's amicus brief as indicating that the act of state doctrine has "no bearing" on the case. Id. at 1361. In a concurring and dissenting opinion, Judges Schroeder and Canby pointed out that the U.S. brief had in fact argued that the act of state doctrine had "little or no bearing on this case at this stage of its development," but that it might prove applicable on a more fully developed record, and that "[e]ven assuming jurisdiction, it is not clear at this stage that the district court should, as a prudential matter, undertake to adjudicate the bulk of the nonfederal claims." Id. at 1370-71 (emphasis added).

n274 In 1982 the Executive suggested that in cases in which an applicable legal standard governing the issue in dispute could be found, it would henceforth only make its views known when necessary to urge judicial

abstention. See Letter from Davis Robinson, Legal Adviser to Rex E. Lee, Solicitor General (Nov. 19, 1982), reprinted in 22 Int'l Legal Materials 207, 207-08 (Marilou M. Righini et al. eds. 1983). This letter was submitted to the court in Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Eth., 729 F.2d 422 (6th Cir. 1984). The effect of this letter would thus be to limit Executive input into a case to situations like Sabbatino.

n275 The Restatement (Third) notes that, in cases in which the Executive indicates that it has no objection to adjudication, courts "make their own determination as to whether to apply the act of state doctrine, taking the view of the Executive branch into account but not being bound by it." Restatement (Third), supra note 102, @ 443 reporters' note 8. On the other hand, when the Executive recommends against adjudication, such a recommendation "will be highly persuasive if not binding." Id. This pattern is precisely consistent with the liberal internationalist prediction that judges will be reluctant to adjudicate at the behest of the executive branch when other factors suggest that they have reached the limits of their competence.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*1977] The following cases depict patterns of both cooperation and conflict among liberal states. Regardless of these specific outcomes, however, all these cases reflect an expanded notion of judicial competence, even in the face of politically sensitive issues. In the aggregate, these features differentiate the liberal zone of law from the liberal-nonliberal zone of politics.

1. Cooperation Within the Zone of Legitimate Difference: Respecting the Wishes of the Foreign Government.

a. Abstention as Cooperation. -- In a cluster of act of state cases involving core members of the liberal community, U.S. courts have adopted a posture profoundly deferential to the foreign sovereign. In two of these cases the courts have deferred directly to the courts of the state in question. In Galu v. Swissair, n276 the Swiss police ordered the forcible expulsion of plaintiff, a U.S. citizen, from Geneva. They hustled her aboard a Swissair flight to New York; n277 once in the United States she promptly sued the Swiss government and Swissair for damages first in Switzerland and then in U.S. courts. n278 The Second Circuit allowed the act of state defense to the extent that the action of the Swiss police officers and Swissair employees in placing plaintiff on a plane to New York was in fact "permitted by Swiss law," an issue that previously had been placed in question by a Swiss court. n279 Following a prior decision by the Swiss Federal Court expressing doubt as to whether the Geneva police had respected "all of [plaintiff's] rights," n280 the U.S. court looked to the Swiss deportation statute and the Swiss Penal Code to determine whether or not the actions of these parties were authorized by Swiss law. The court concluded that if in fact the Swiss police officers were not authorized by Swiss law, then the court was prepared to recognize "whatever substantive tort law defenses Swiss law makes available to a private entity acting at the behest of local police authorities." n281 The U.S. court was thus prepared to decide the case as if it were standing in for the Swiss court, applying Swiss law to the extent the Swiss government recognized it as valid law.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n276 873 F.2d 650 (2d Cir. 1989).

n277 See id. at 652.

n278 See id. at 652-53.

n279 Id. at 653 (emphasis added).

n280 Id. at 654.

n281 Id. at 654-55.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

In Central Cartage Co. v. Her Majesty the Queen in Right of Canada, n282 a challenge by a U.S. corporation to a Canadian order-in-council, the [*1978] U.S. court applied the act of state doctrine as a device to reserve decision pending the outcome of ongoing Canadian judicial proceedings. n283 Describing Canada as "our nearest neighbor and closest friend," the court explained that an attempt by a U.S. court "to assess which side has the better of the question under Canadian law" would be "presumptuous." n284

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n282 576 F. Supp. 1416 (D.C. Mich. 1983).

n283 See id. at 1418. As an alternative ground for its decision, the court applied the Pullman doctrine of federal-state abstention, thereby essentially equating Canada with a sister state. See id.

n284 Id. at 1417.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

In both of these cases the courts did not doubt their competence to decide the issues in question, but chose to defer directly, and respectfully, to a decision by the foreign government. In each case the court described its act as one of abstention or restraint, but the outcome could be equally accurately described in pure conflicts terms as a decision to apply the foreign law. n285

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n285 In two cases challenging the acts of the governments of Israel and Great Britain, the decision to abstain on the merits can be characterized as an affirmation of common values. In Friedar v. Israel, 614 F. Supp. 395 (S.D.N.Y. 1985), a New York district court refused to entertain a claim by a New York citizen for the medical costs and expenses incurred as a result of an injury sustained while serving in the Israeli army in 1948. The court noted that "identical activity by the United States government would not be subject to judicial review." Id. at 400 (emphasis added). As in Central Cartage, the court revealed its underlying posture of respect and deference with a comment on the "presumptuous[ness]" of reviewing Israel's internal administrative activity. Id. This use of U.S. law as a baseline from which to assess the acceptability of the result achieved by applying the act of state doctrine also informed Herbage v. Meese, 747 F. Supp. 60 (D.D.C. 1990), aff'd, 946 F.2d 1564 (D.C. Cir.

1991), a Bivens claim brought by a British convict suing both U.S. and British officials for violation of his rights under the U.S. Constitution during the process of extraditing him from Britain. The court dismissed the claim on both sovereign immunity and act of state grounds. Although the discussion of the act of state doctrine proceeded on separation of powers grounds, noting the importance of avoiding judicial hindrance of the pursuit of the national interest in the international sphere, the court acknowledged in a footnote that plaintiff would probably not have been entitled to relief under U.S. law in any event. See id. at 66 n.11. In Sabbatino, adjudication of plaintiff's claim under U.S. law would have reached the diametrically opposite result from that achieved by application of the act of state doctrine. In these two cases, by contrast, application of the doctrine confirms the fundamental identity of the position taken by the foreign government and the policy choices embedded in U.S. law.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

b. Adjudication as Cooperation. -- In another group of cases involving liberal states, cooperation with the foreign government paradoxically dictates actual invalidation or nonrecognition of the alleged act of state. In these cases U.S. courts cooperate with the foreign government to punish acts deemed violative of principles shared by both nations. This posture contrasts sharply with those cases involving nonliberal states in which the decision to adjudicate in the face of the foreign government's effort to raise the act of state doctrine resulted in judicial-executive confrontation of the foreign state.

The most celebrated cases in which a foreign government has argued [*1979] against the application of the act of state doctrine are the Marcos cases. In two of these, both involving claims of bribery and corruption, the newly democratic government was actually the plaintiff, arguing vigorously, and successfully, against application of the act of state doctrine to shield the acts in question from judicial scrutiny. n286 In yet a third case, plaintiff challenged the legality of an act by the agency appointed by the new Aquino government to investigate Marcos' alleged crimes. n287 The case arose out of a dispute over the ownership of an airplane sequestered by the Philippine Presidential Commission on Good Government (PCGG) as the property of a crony of former dictator Ferdinand Marcos and subsequently sold to defendant. n288 The U.S. court again declined to apply the act of state doctrine, this time deferring to a ruling by a Philippine court denying the PCGG authority to sell the plane. n289

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n286 See Republic of Phil. v. Marcos, 862 F.2d 1355 (9th Cir. 1988); Republic of Phil. v. Marcos, 806 F.2d 344 (2d Cir. 1986). Both the Second and the Ninth Circuit noted the posture of the current government as a factor in their decision not to apply the doctrine. See 862 F.2d at 1361; 806 F.2d at 359. In Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987), two Argentinian citizens brought an action under the Alien Tort Statute against an Argentinian general residing in the United States for alleged torture committed under the auspices of the former military junta. The court held that the act of state doctrine did not support defendants' motions to dismiss. See id. at 1544-47. Although the restored constitutional government of Argentina did not attempt to intervene in the suit, the court noted at the outset of its opinion that General Suarez-Mason had been arrested pursuant to a provisional arrest warrant at the

request of the Argentinian government, which sought to deport him to face prosecution for torture in Argentina. See id. at 1536.

n287 See Faysound, Ltd. v. Walter Fuller Aircraft Sales, Inc., 748 F. Supp. 1365, 1373 (E.D. Ark. 1990), appeal dismissed sub nom. Faysound, Ltd. v. Falcon Jet Corp., 940 F.2d 339 (8th Cir. 1991), cert. denied, 1125 S. Ct. 1175 (1992). The court also invoked the "treaty exception" and the Hickenlooper Amendment in support of its decision not to apply the doctrine. See id. at 1370-72.

n288 See id. at 1366-67.

n289 See id. at 1369-70.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

In all the above cases involving liberal states, regardless whether the court decides to adjudicate or to refrain from adjudication, the result reached is one the foreign state in question is likely to approve. n290 [*1980] In virtually all of these cases the court could have reached the identical result on a standard conflicts analysis. What is noteworthy, however, is the relative premium placed on the views of the foreign government itself, a concern completely lacking in act of state cases involving nonliberal states, and an underlying presumption of judicial competence to handle the issues presented even when they bear on quite sensitive foreign policy issues.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n290 A less dramatic instance of this result occurred in an action brought by the United States against a cargo of rare Peruvian parakeets. The Peruvian official charged with issuing an illegal export permit claimed that issuance of the permit was an unreviewable act of state. The court disagreed on the ground that the Peruvian authorities had themselves informed U.S. authorities as to the invalidity of the permit. See United States v. 2,507 Live Canary Winged Parakeets, 689 F. Supp. 1106, 1120 (S.D. Fla. 1988). In Dominicus Americana Bohio v. Gulf & W. Indus., 473 F. Supp. 680 (S.D.N.Y. 1980), an antitrust action involving alleged acts on the part of the Dominican Republic, the court based its refusal to apply the act of state doctrine in part on the government's subsequent repudiation and rescission of the act allegedly instigated by defendant. See id. at 689-90. In United States v. Evans, 667 F. Supp. 974 (S.D.N.Y. 1987), the court held that the act of state doctrine did not bar a criminal prosecution under the Arms Export Control Act against licensed Israeli arms dealers for selling arms originally sold to Israel to Iran. See id. at 986-88. The court emphasized the apparent willingness of the Israeli government to cooperate with the criminal investigation and to facilitate the conduct of the trial itself as evidence of its presumably favorable posture toward the case. See id. at 984.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

2. Conflict Within the Zone of Legitimate Difference: Interest-Balancing. -- Relations among liberal states are clearly not always blessed with harmony and cooperation. The common values underpinning broadly similar domestic political systems do not prevent conflict per se, but rather affect the mode of its resolution. U.S. courts faced with such conflicts resolve them by interest-balancing based on reciprocity. In the zone of liberal states, as

discussed in Part III, comity is defined to include expedience, and expedience depends on the importance of the interest asserted versus the harm and the likelihood of retaliation. Two features of this process stand out. First, judges themselves play a vigorous role in assessing and weighing the interests of the states in question. Second, although many of these conflicts are highly politically charged, this political dimension is not deemed inconsistent with judicial resolution.

a. Judicial Foreign-Policymaking in Dialogue with Foreign Courts. -- Three cases may be used as prototypes of judicial handling of the act of state doctrine in cases involving an underlying conflict with a liberal state. First is a straight reciprocity case. In Remington Rand v. Business Systems Inc., n291 the court found that the act of state doctrine did not apply to bar adjudication because the allegedly illegal action of a Dutch bankruptcy trustee in transferring business secrets to one of plaintiff's competitors without compensating plaintiff did not "rise to the dignity of acts of a foreign sovereign." n292 The court went on to give careful consideration of the respect due the Dutch courts as a matter not only of comity, but also of reciprocity. It finally decided to condition adherence to Dutch decisions on guarantees of reciprocal Dutch respect for U.S. decisions, directing the district court to seek assurances of reciprocity from the Dutch court before rendering a final judgment. This solution would "afford appropriate protection to an American creditor, yet also acknowledge the primary role of the Dutch court in equitably distributing the available funds." n293

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n291 830 F.2d 1260 (3d Cir. 1987).

n292 Id. at 1265.

n293 Id. at 1273. It is noteworthy that the court began by noting a U.S. bankruptcy court's initial determination that "as an industrialized society, The Netherlands would afford protection to Remington U.S.'s trade secrets." Id. at 1264.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*1981] A second prototypical case is Mannington Mills v. Congoleum Corp., n294 a case elaborating a full-fledged interest-balancing approach. Mannington Mills was an antitrust action between two U.S. manufacturers in which plaintiff alleged defendant had secured a number of foreign patents by fraud. n295 As in Remington Rand, the court found that the grant of a patent was "ministerial activity" of insufficient foreign policy interest to qualify as an act of state. n296 Notwithstanding this finding, the court did in fact recognize the presence of significant U.S. foreign policy concerns in the case, which it discussed under the heading "Comity, Abstention and International Repercussions." n297 To take the legitimate commercial interests of the states whose grant of patents stood to be invalidated into account, the court proposed a case-by-case application of the same balancing test it had previously adopted to determine the appropriate extraterritorial scope of U.S. antitrust laws. Use of this test would likely produce different results with regard to each of the 26 countries concerned. n298

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

-

n294 595 F.2d 1287 (3d Cir. 1979).

n295 Twenty-six foreign patents were at issue, involving Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, France, West Germany, Greece, India, Ireland, Israel, Japan, Mexico, The Netherlands, New Zealand, Pakistan, Peru, Philippines, Spain, Sweden, Switzerland, Turkey and Venezuela. At the date of the decision, 19 of these 26 countries were liberal according to the Doyle index. See supra note 215.

n296 See 595 F.2d at 1293-94.

n297 Id. at 1294-98.

n298 See id. at 1297-98; accord Forbo-Giubiasco S.A. v. Congoleum Corp., 516 F. Supp. 1210, 1217-18 (S.D.N.Y. 1981) (parallel litigation involving Swiss patents).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers n299 is the third prototype, illustrating an interactive judicial-governmental dialogue between two liberal states. In an action by a Swiss corporation against the United States government to recover assets seized under the Trading with the Enemy Act, the district court ordered plaintiff to produce a large number of records documenting ownership of the assets in question. n300 Plaintiff claimed in response that compliance with the order would force it to violate Swiss bank secrecy laws. n301 Plaintiff ultimately complied with the order in part, but not in full, leading the district court to dismiss its action with prejudice. n302 The Supreme Court reversed, laying out a two-step inquiry that would separate the issues of whether to issue a discovery order in the first place from the subsequent question of imposing sanctions for noncompliance with such an order. n303 In practice, the Court set up an incentive system for the party subject to the discovery order to make [*1982] every effort to seek a waiver from the foreign government. n304 If such efforts were made in good faith but nevertheless failed, the party should not necessarily be subject to sanctions. More generally, however, this two-step inquiry functions as a mode of communication between the court and the foreign government, in which the court can first determine to what extent the foreign government thinks its vital interests are at stake in upholding the law, and then proceed to weigh them against U.S. interests. n305 By comparison, an act of state type analysis choosing whether or not to give effect to the foreign law rests on a sharp delineation of sovereign boundaries.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n299 357 U.S. 197 (1958).

n300 See id. at 200.

n301 See id.

n302 See id. at 201-02.

n303 See id. at 204-08.

n304 See id. at 212.

n305 A similar and striking example of intra-liberal dialogue, this time between two courts, appears in the Nylon Patent litigation in the mid-1950s. The United States brought a suit against duPont and Imperial Chemical Industries (ICI), a British corporation, for concluding a global market-sharing agreement for the sale of nylon. A U.S. court ordered ICI to license its U.S. nylon patents on a reasonable royalty basis and sought to fashion a similar remedy operative in Britain by ordering ICI not to challenge violations of its British patents by nylon importers into Britain. See United States v. Imperial Chem. Indus., Ltd., 105 F. Supp. 215 (S.D.N.Y. 1952). In a subsequent suit against ICI by one of its subsidiaries for specific performance on a contract for exclusive patents, a British court rejected the portion of the U.S. decree that purported to affect rights created under British law, arguing that the U.S. court would not regard this action "as in any way inappropriate." British Nylon Spinners, Ltd. v. Imperial Chem. Indus., 1 Ch. 37, 53 (1955). The U.S. court subsequently modified this portion of its decree. For excerpts from this judicial dialogue, see 1 Abram Chayes et al., International Legal Process 397-402 (1968).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The difference between these cases and those analyzed above involving nonliberal states is not the presence or absence of foreign policy concerns. On the contrary, the Mannington Mills court explicitly acknowledged that enforcing a U.S. judicial decree invalidating foreign patents might "present problems of international relations." n306 And, as discussed below, blocking statutes of all types have been highly politically charged. But the presence of these concerns was not held to block adjudication any more than domestic political concerns would be held to block adjudication of an antitrust or voting rights case. In all three cases, and others like them, n307 courts have recognized the very real possibility of conflict with one or more foreign states, but have sought nevertheless to ascertain how best to advance U.S. interests while still taking foreign interests into account. The Remington Rand solution conditioned deference to the Dutch court on a guarantee of [*1983] protection of the U.S. creditor; Mannington Mills left open the possibility of straight deference on comity grounds but made such an outcome contingent on interest-balancing; and Societe Internationale created an opportunity for the foreign government to demonstrate the strength of its interests in an indirect dialogue with the court.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n306 Mannington Mills v. Congoleum Corp., 595 F.2d 1287, 1294 (3d Cir. 1979).

n307 See, e.g., In Re Insurance Antitrust Litigation, 938 F.2d 919, 934 (9th Cir. 1991) (upheld U.S. antitrust jurisdiction while acknowledging "conflict with a long-established British policy towards a venerable British trade, the underwriting of insurance."); United States v. First Nat'l Bank of Chicago, 699 F.2d 341, 345 (7th Cir. 1983) (balanced competing interests of Greek criminal law and IRS summons compelling disclosure); United States v. First Nat'l City Bank, 396 F.2d 897, 902-04 (2d Cir. 1968) (balanced U.S. interest in enforcement of antitrust laws against German interest in bank secrecy); see generally Born & Westin, supra note 164, at 3-5.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

b. Adjudicating "Politically Sensitive" Acts. -- The fallback distinction adopted by both courts and commentators to differentiate act of state cases from other cases with international implications is that the act of state doctrine is applied to avoid adjudication of "politically sensitive" disputes. n308 But this formulation begs a deeper question. Which disputes are sufficiently politically sensitive to require application of the act of state doctrine?

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n308 International Ass'n of Machinists v. OPEC, 649 F.2d 1354 (9th Cir. 1981), emphasized the connection between the political sensitivity of the underlying dispute and the separation of powers rationale for the act of state doctrine. See id. at 1358-59. Since that decision at least one court has actually incorporated the term into the definition of the doctrine: "The act of state doctrine provides that a United States court will not adjudicate a politically sensitive dispute which would require the court to judge the legality of acts of a foreign state completed within that state's territory." Bank Tejarat v. Varsho-Saz, 723 F. Supp. 516, 517 (C.D. Cal. 1989) (citing Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1046 (9th Cir. 1983)).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The answer is disputes with nonliberal states. The best evidence for this proposition is the dog that did not bark -- a number of cases involving conflict among liberal states over the effect to be given to each other's laws in which the act of state doctrine is frequently not even raised. The most important categories are cases like Societe Internationale, involving foreign "clawback" and "blocking" statutes designed to thwart the extraterritorial application of U.S. antitrust laws and the extraterritorial enforcement of U.S. discovery orders. These foreign laws can certainly be understood as official "acts of state." n309 The question, as in the classic act of state cases, is whether and to what extent U.S. courts should apply such laws. Further, the underlying conflict between the states in question is certainly heated, involving judicial, legislative, and diplomatic moves and countermoves amid a great deal of strong rhetoric. At no point, however, has it ever been suggested that courts should accept the acts of the foreign governments involved as acts of state, much less withdraw from the fray altogether.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n309 See supra note 77.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

As Detlev Vagts has put it, extraterritorial enforcement of U.S. laws, particularly in the antitrust area, "has an acute tendency to place the United States on a collision course with other nations jealous of their sovereign prerogatives or hostile to American policy." n310 The history, particularly in the antitrust area, is littered with diplomatic protests, n311 [*1984] foreign judicial decisions refusing to enforce U.S. laws, n312 and, beginning in the 1970s, "blocking statutes." n313 States resorting to such statutes include France, Britain, Canada and Australia. n314 Britain in particular became so

exasperated with what it perceived as U.S. obduracy and highhandedness that in 1979 it passed the Protection of Trading Interests Act (PTIA), n315 designed explicitly to "reassert and reinforce the defences of the United Kingdom against attempts by other countries to enforce their economic and commercial policies unilaterally on us." n316 The statute prevented enforcement of multiple damage awards in foreign antitrust cases and provided British parties to foreign antitrust suits with a "clawback" remedy allowing them to recover two-thirds of any U.S. damage award from the U.S. plaintiff. n317

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n310 Deltev F. Vagts, Trends in International Business Law: Towards a New Ethnocentricity?, 1 Nw. J. Int'l L. & Bus. 11, 15 (1979). Harold Maier reaches the same conclusion in Interest Balancing and Extraterritorial Jurisdiction, 31 Am. J. Comp. L. 579, 579 (1983).

n311 See Maier, supra note 310, at 579 n.2 & 580 n.3.

n312 See 1 James R. Atwood & Kingman Brewster, Antitrust and American Business Abroad @ 4.18 (2d ed. 1981 & Supp. 1992); Maier, supra note 310, at 579 n.2 & 580 n.3.

n313 For a general overview of these statutes and a guide to the relevant literature, see Born & Westin, supra note 164, at 282-84, 445-47.

n314 Earlier examples were designed less as a weapon against a particular foreign sovereign than as protection of particular national interests and industry. The Swiss bank secrecy law, dating from 1934, typifies such a statute. See id. at 282. Subsequent bank secrecy laws passed by states such as Panama, the Bahamas, Bermuda, the Cayman Islands and Singapore do not fit the general model described above.

n315 1980, ch. 11 (Eng.).

n316 973 Parl. Deb., H.C. (5th ser.) 1533 (1979). The quotation is from the British Secretary of State for Trade's speech introducing the bill in Parliament. For a discussion of the background to the act, see Edward Gordon, Extraterritorial Application of United States Economic Laws: Britain Draws the Line, 14 Int'l Law. 151 (1980); David L. Hacking, The Increasing Extraterritorial Impact of U.S. Laws: A Cause for Concern Amongst Friends of America, 1 Nw. J. Int'l L. & Bus. 1 (1979); A.V. Lowe, Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980, 75 Am. J. Int'l L. 257 (1981).

n317 See Protection of Trading Interests Act, 1980, ch. 11, @ 6, sched. 2 (Eng.).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The PTIA exemplifies the seriousness of the dispute and the level to which tensions had risen between the United States and one of its oldest allies. It was precisely the "political sensitivity" of such disputes that led many commentators to urge the courts to take a backseat to diplomatic resolution of extraterritoriality conflicts, n318 and others, including the authors of the Restatement (Third), to recommend increasing judicial restraint based on

comity in deciding whether to apply U.S. laws abroad in a specific case. n319 The courts eventually complied, at least in relative terms, and adopted an interest-balancing test that allowed them to weigh competing policy interests of the sovereigns involved. n320 In the meantime, however, none of the courts actually [*1985] confronted with a foreign blocking statute ever decided to defer to such a statute based on the act of state doctrine.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n318 See, e.g., Maier, supra note 310, at 581, 585, 593-94; Harold G. Maier, Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law, 76 Am. J. Int'l L. 280, 317 (1982); George P. Shultz, Trade, Interdependence, and Conflicts of Jurisdiction, 36 S.C. L. Rev. 295, 305 (1985).

n319 See Restatement (Third), supra note 102, @ 403 cmt. g.

n320 See, e.g., Romero v. International Terminal Operating Co., 358 U.S. 354, 382-83 (1959); Lauritzen v. Larson, 345 U.S. 571, 577 (1953); Mannington Mills v. Congloleum Corp., 595 F.2d 1287, 1301 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of Am. N.T. & S.A., 549 F.2d 597, 614 (9th Cir. 1976). For a concise history of the adoption of this test, also known as the jurisdictional "rule of reason," see Restatement (Third), supra note 102, @ 403.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Courts that found their discovery orders blocked by foreign legislation clearly faced a foreign act of state, considered and imposed at the highest levels as a countermove in a highly charged political and economic dispute. Yet instead of applying, or often even considering, the act of state doctrine, they typically weighed U.S. regulatory interests against the interests of the foreign sovereign and decided to enforce their discovery order. n321 Even in cases in which they declined to enforce such orders, the rationale was the superior foreign interest rather than the act of state doctrine. n322 Further, in the celebrated Laker litigation of the mid-1980s, in which airline entrepreneur Freddie Laker sued several British and American carriers under U.S. antitrust laws for driving him out of business, U.S. and British courts engaged in a long struggle over jurisdiction and the measure of damages. n323 Both sides issued antisuit injunctions and counter-antisuit injunctions to try and block proceedings in the other forum. n324 The case was finally resolved [*1986] with the help of diplomatic intervention, demonstrating a nice mix of political and legal dispute resolution. n325

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n321 Three cases typically cited as examples in this area are United States v. Bank of Nova Scotia, 740 F.2d 817, 831-32 (11th Cir. 1984), cert. denied, 469 U.S. 1106 (1985); United States v. Vetco, Inc., 691 F.2d 1281 (9th Cir.), as amended Oct. 22, 1981, cert. denied, 454 U.S. 1098 (1981); and SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111 (S.D.N.Y. 1981). The first two cases involved a Swiss blocking statute making it a criminal offense to divulge certain business information to foreigners. In both cases the court found that the U.S. interest in collecting taxes and enforcing securities laws outweighed the Swiss interest in secrecy. In Bank of Nova Scotia, the Justice Department sought documents from the Bahamian branch of a Canadian bank for a grand jury

investigation of alleged narcotics and tax violations. The court again found that the U.S. interest outweighed the Bahamian interest in bank secrecy. The British government filed an amicus brief in this case arguing that the act of state doctrine should be applied to uphold the Bahamian law; the court dismissed this argument on the blanket assertion that "the doctrine had no application to this case." Id. at 832. Again, the result is consistent with a hypothetical application of the Bernstein exception, in which the court simply defers to Executive wishes in a particular case. The Bernstein exception is never raised in these cases, however, at least not in terms, because the court is never operating on the baseline assumption, as it would be far more likely to do in cases involving nonliberal states, that the act of state doctrine would apply.

n322 See, e.g., United States v. First Nat'l Bank of Chicago, 699 F.2d 341, 345 (7th Cir. 1983); In re Westinghouse Elec. Corp. Uranium Contracts Litig., 563 F.2d 992, 998 (10th Cir. 1977); Minpeco, S.A. v. Conticommodity Servs., Inc., 116 F.R.D. 517 (S.D.N.Y. 1987).

n323 See Laker Airways Ltd. v. Pan Am World Airways, 559 F. Supp. 1124 (D.D.C. 1983), aff'd sub nom., Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984); Born & Westin, supra note 164, at 248-58; Daryl A. Libow, Note, The Laker Antitrust Litigation: The Jurisdictional "Rule of Reason" Applied to Transnational Injunctive Relief, 71 Cornell L. Rev. 645 (1986).

n324 See Libow, supra note 323, at 656 n.63.

n325 For a concise history of the many twists and turns of the Laker litigation, see Restatement (Third), supra note 102, @ 403 reporters' note 7.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The liberal internationalist model asserts that among liberal states, courts and lawmakers will increasingly interact as the framers and guardians of the nation's interests and the balancers of these interests against the legitimate needs of other nations. The most striking feature in the extensive literature on these cases, loosely grouped together as "international regulatory cases," is a tacit recognition of courts as foreign policymakers. Courts themselves share this perception of their function, engaging in a continuing dialogue not only with the U.S. Executive, but with the courts and legislatures of foreign governments as well. Yet courts perform this function only within a certain zone -- a zone where the boundary between law and politics is highly permeable, allowing courts to play a continuing role both in shaping legal rules with political consequences, and in taking account of the political consequences of the rules they shape. n326

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n326 Professor Maier, for one, would strongly disagree. The thesis of his article, Extraterritorial Jurisdiction at a Crossroads, supra note 318, is that regulatory cases and act of state cases form a continuum of disputes in which courts must develop principles consonant with the preservation of transnational intercourse throughout the international system. See id. at 280-81. He thus praises Sabbatino as part of an entire line of Supreme Court cases in various international areas enshrining a principle of judicial restraint in the service of larger systemic interests. See id. at 310-11. In this regard he is heir

to Richard Falk's vision of private and public international law combining to enforce pluralist respect as a systemic norm. It is noteworthy, however, that he praises cases such as Sabbatino but criticizes what he regards as excessive judicial activism in the international regulatory cases, calling on courts to leave the negotiation of conflicting national interests to the diplomats. See id. at 317-19; Maier, supra note 310, at 581. Courts in these cases have not heeded this call. Even where they have adopted a more restrained approach, they have reserved the balancing process for themselves, except to the extent that they are now searching for more concrete rules.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

V. TOWARD A LIBERAL INTERNATIONALIST REVISION OF THE ACT OF STATE DOCTRINE

Having addressed the interpretive and predictive power of the liberal internationalist model, I turn now to its normative implications. Although the above analysis demonstrates the extent to which the act of state doctrine in its present form can be usefully understood within the framework of a division between liberal and nonliberal states, it also suggests ways in which the liberal internationalist model can be used to revise the doctrine. On the most practical level, the liberal internationalist model helps resolve existing doctrinal controversies concerning the wisdom of Sabbatino and the proper delineation of functions between the Executive and the judiciary. A liberal internationalist revision of the doctrine could also help take account of states that do not fit the liberal-nonliberal dichotomy.

[*1987] Beyond the general virtues of clarification and precision, the liberal internationalist model also offers a new paradigm for progressive change. It is premised on the desirability of expanding the zone of liberal states, thereby fostering the domestic rule of law, protection of fundamental human rights, and economic and social interdependence. It proposes to accomplish these goals, however, not by violating the sovereignty of nonliberal states but by recognizing it. I offer here a sketch of how this insight could be incorporated into a revision of the act of state doctrine. In conclusion, I also discuss ways in which the liberal internationalist model itself could be revised to take account of insights generated by its application to the act of state doctrine and its broader potential applications.

A. Advantages of a Normative Application of the Liberal Internationalist Paradigm

1. Defending Sabbatino. -- A liberal internationalist interpretation of the act of state doctrine explains the dual character of the doctrine and links it to the division between liberal and nonliberal states. It explains the conflicts view of the doctrine -- a doctrine directing the application and hence validation of the law of the foreign state -- as consistent with the deep premises underlying the liberal "zone of law." Conversely, it explains the Sabbatino version of the doctrine -- a rule reflecting a delimitation of judicial competence -- as a demarcation of the boundary between the zone of law and the nonliberal "zone of politics."

On a more practical level, this interpretation of the act of state doctrine permits a strong defense of Sabbatino at a time when it is newly under attack. n327 To reduce the doctrine solely to a conflicts rule would make sense only in a wholly liberal world, in which case the doctrine would be superfluous in any

event. As long as there are nonliberal states, liberal courts will need a mechanism for identifying the appropriate dividing line between judicial and political dispute resolution and for stepping back and refusing to perform their normal function without seeming to validate the acts or laws that fundamentally contravene liberal principles. In the world we live in, and the world we will continue to live in for the foreseeable future, the tension between the two conceptions of the doctrine is necessary and irreducible.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n327 See supra text accompanying notes 133-136.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Whether both of these conceptions should continue to cohabit under the same doctrinal roof is another matter. Kirkpatrick n328 suggests that the Supreme Court may be contemplating a bifurcated division of labor whereby the act of state doctrine would perform a traditional conflicts function, directing a court either to apply or to invalidate [*1988] a foreign law, and the broader judicial competence questions addressed in Sabbatino would be addressed separately under some version of the political question doctrine. n329 Although this solution would resolve much of the analytical tension plaguing the act of state doctrine, its promise of clarity is illusory. It is a solution that would forsake the morass of the act of state doctrine only to enter the mire of the political question doctrine. More generally, it would render the act of state doctrine redundant, since the same result could be reached by applying ordinary conflicts rules, and would vitiate the potential benefits to be gained by maintaining the doctrine as an extraordinary doctrine designed to address the nonliberal acts of nonliberal states.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n328 W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l, 493 U.S. 400 (1990).

n329 See id. at 408-10.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

2. Drawing the Line Between the Executive and Judiciary. -- A liberal internationalist revision of the act of state doctrine would also incorporate a coherent philosophical rationale for why refusal to adjudicate the validity of nonliberal acts of nonliberal states does not represent abdication of the judicial function or blind deference to the Executive, but rather is consistent with the role of courts in a liberal democracy. From a liberal internationalist perspective, Sabbatino stands as a case in which the Court avoided the triple pitfalls of invalidating Cuban law as political act, validating it as law, or acting as the political agent of the Executive. Its successful delimitation of its competence, by contrast, vindicated a liberal conception of law as resting on a minimum underlying consensus concerning common political, economic, and social values and institutions, and a liberal conception of courts as at least semiautonomous agents of the law.

Against this backdrop, the continued rejection of the Bernstein exception by a majority of the Supreme Court must be lauded. The Court may decide that a

particular dispute is suited only for resolution by the political branches, but it is the Court itself that must reach that decision. Conversely, the Executive may have its say in that decisionmaking process, but not the last word.

3. Taking "Quasi-Liberal" and "Transitional" States into Account. -- A large number of states cannot be clearly categorized as liberal or nonliberal. As it stands, attempted application of the act of state doctrine to these intermediate states yields confusion. Indeed, many current subsidiary exceptions to the doctrine have been developed by courts trying to find their way in this intermediate realm. Only by building the liberal-nonliberal distinction directly into the doctrine and specifying the criteria on which the definitions of liberal and nonliberal are based will it be possible to revise the doctrine to take account of these states.

States that are difficult to classify as liberal or nonliberal generally fall into two interrelated groups: quasi-liberal states and transitional states. Quasi-liberal states are states with some liberal qualifications but not others. The notion of an absolute divide between liberal and [*1989] nonliberal states is obviously absurd, even assuming complete agreement on the precise defining characteristics of a liberal state. I chose to use Michael Doyle's relatively crude classification scheme as a first cut; however, several political scientists have already added substantial refinements. n330

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n330 See Maoz & Abdolali, supra note 17, at 5. In a recent comprehensive statistical analysis testing and verifying the liberal hypothesis, Maoz and Abdolali argue that a strict division between "democracies" and "autocracies" mistakenly assumes a linear continuum between "freedom" and "nonfreedom," analogous to a left-right political continuum within states. See id. at 7-8. These scholars substitute a tripartite scheme, dividing states into democracies, autocracies, and "anocracies." Anocracies have a mixture of the characteristics of both democracies or autocracies, or are sometimes states undergoing rapid change from one system to another. Democracies and autocracies, by contrast, differ sharply along some measures but also have many characteristics in common: clear regime definition; institutions capable of making, interpreting, and enforcing laws; a clear monopoly over the means of coercion; and close coordination of state institutions, even within a system of checks and balances. See id. at 8. Many of the nations involved in act of state cases would almost certainly qualify as anocracies.

Kant studiously avoided the term "democracy," all too aware of the dangers of mob rule. Maoz and Abdolali's definition of "democracy" nevertheless corresponds closely to Doyle's definition of a "liberal" regime. They look to six distinct attributes: method of executive selection, type of political competition and opposition, characteristics and independence of executive policymaking and its decisionmaking latitude, distribution of authority, type of political participation, and scope of governmental functions. See id. at 11. They measure these attributes across time, both at the onset and termination of a particular polity. They then combine the resulting scale with a second scale based on a binary rating for relative democracy, anocracy, and autocracy. The result is a comprehensive scale designed to measure "both the level of political freedom in a given polity and the stability and clarity of these characteristics." Id. at 12.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Transitional states present another difficult analytical problem. The logical application of liberal internationalist analysis would take account of the nature of the foreign state at the time the suit is brought. However, a court may understandably be influenced by the nature of the state at the time the acts forming the subject of the dispute occurred. n331 An additional source of confusion is a liberal regime that may manifest nonliberal tendencies when first in power. n332

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n331 The paradigm case in this category is a suit against a foreign dictator, such as that brought in Guinto v. Marcos, 654 F. Supp. 276 (S.D. Cal. 1986), a suit brought in August 1986, shortly after a popular revolution toppled dictator Ferdinand Marcos and elected President Corazon Aquino under a constitutional regime. Plaintiff was challenging the acts of the former nonliberal government, alleging a violation of his First Amendment rights resulting from the Marcos government's confiscation of his film in 1975. See id. at 277. The court demurred under the act of state doctrine, using precisely the combination of delimitation of judicial competence and disapproval that characterizes the application of the doctrine to acts of nonliberal states. See id. at 280-81. The court was presented not only with the acts of a nonliberal regime at the time they were committed, but it was being asked to hold the embodiment of that regime himself liable -- a task even the new government had not yet undertaken.

n332 Two of the exceptions cited by Doyle concerning liberal states that have in fact gone to war with one another were states whose liberal regimes had been in power for less than three years. See supra note 16.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*1990] B. The Act of State Doctrine as an Instrument of Change

The most important reason to rely explicitly on a distinction between liberal and nonliberal states is to tap the potential of the liberal internationalist model for achieving progressive change through the transnational international legal system. This potential derives from the paradox discussed in the Introduction: liberal states are more likely to have the validity of their laws subject to review by the courts of other liberal states than are nonliberal states. Further, liberal states are more likely to find their laws bypassed on the basis of an implicit or explicit interest-balancing test than are nonliberal states. From this perspective, at least, the sovereignty of liberal states is more permeable than that of nonliberal states. On the other hand, liberal states correspondingly reap the political and economic benefits of membership in the zone of law.

This insight opens the door to new ways of thinking about how to promote liberal values in the international realm, based not on confrontation, but rather on the hope of emulation. A liberal internationalist approach would seek to demonstrate to nonliberal states that while insistence on the prerogatives of sovereignty in defense of nonliberal acts may be an entitlement, it can also be a handicap. In the discussion below, I seek to build on this premise in the context of a more concrete proposal for a possible revision of the act of state doctrine.

1. Application of the Doctrine to Nonliberal States: A Badge of Alienage. -- A liberal internationalist act of state doctrine would interpret the line between liberal and nonliberal states as a deep intuition of similarity and shared values, on the one hand, versus tacit recognition of difference and alienage on the other. An express reformulation and explanation of the doctrine in liberal internationalist terms could use the doctrine as a more explicit marker by applying it only to nonliberal states. Henceforth, application of the doctrine to bar adjudication of the validity of the act of a certain state would be a judicial declaration that the state in question does not play by liberal rules. It would operate not as a mark of reciprocal tolerance and respect, but as a badge of alienage. n333

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n333 I am indebted to Geoffrey Stone for this particular formulation.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Such a revision of the act of state doctrine could simultaneously clarify and enhance the value of its application while decreasing the likelihood of its invocation. Application of the doctrine as a delimitation of the boundary between liberal and nonliberal states could have both economic and political consequences. Economic actors would be on direct notice that they trade or invest or lend to the country in question at their own risk, without basic liberal legal protections, even in their forum of choice. Similarly, foreign states seeking to invoke the act of state doctrine to shield adjudication of a violation of civil or political liberties would effectively be declaring a lesser allegiance to those liberties. [*1991] Such a message could place nonliberal governments in a dilemma. Requesting application of the act of state doctrine would shield their acts from U.S. judicial scrutiny, thereby salving their sovereign sensitivities, but at the price of potential economic and moral ostracism from the liberal community.

Some nonliberal states are likely to be more than willing to pay this price, explicitly proclaiming their rejection of liberal values and institutions. Many states on the margin, however, particularly those I have termed "quasi-liberal," might be more likely to trade the cost of judicial scrutiny for the liberal status it would now explicitly affirm. So too with newly liberal states, such as the former Communist states of Eastern Europe. As Cass Sunstein has recently observed, these states must simultaneously manage a transition to democracy, to markets, and to constitutionalism. n334 As these goals begin to conflict with one another, the temptation to override the newfound commitment to private property rights and fundamental civil and political rights is likely to mount. By renouncing the act of state doctrine as a prospective defense to a challenge in U.S. courts to a potential breach of these rights, Eastern European governments could effectively adopt a precommitment strategy to subject their current promises to future review.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n334 See Cass Sunstein, Constitutionalism, Prosperity, Democracy: Transition in Eastern Europe, 2 Const. Pol. Econ. 371, 371 (1991).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

An advantage of this approach is that it would allow states themselves to choose whether to invoke the doctrine, and thus implicitly to locate themselves on the liberal-nonliberal spectrum. This device would circumvent the difficulty of asking courts or Congress to distinguish between liberal and nonliberal states. Once Congress or the Supreme Court had revised the doctrine in liberal internationalist terms, a state choosing to invoke the doctrine would be declaring itself a nonliberal state. In cases between private individuals in which an individual party seeks to invoke the act of state doctrine, the court could solicit the views of the state in question as to whether the defense should be honored.

As a subsidiary benefit, attaching this new meaning to invocation and application of the act of state doctrine should obviate the need for virtually all of the current exceptions to the doctrine. In the first place, to the extent that such exceptions are motivated by an Executive-judicial desire to confront and oppose the nonliberal state, application of the act of state doctrine as a badge of alienage should serve this purpose without more. Instead of manipulating the situs of intangible property so as to be able to invalidate the act as a violation of U.S. public policy, for instance, a court would apply the act of state doctrine as a declaration that the rules governing the entire foreign system were fundamentally at odds with the most basic principles informing and shaping the foundation of the U.S. political and economic [*1992] system. n335 Similarly, situations that under the current doctrine might be expected to give rise to the commercial acts exception or the treaty exception would fit neatly within this larger analytical framework. Nonliberal states that expect to engage in commerce with liberal states, either directly or under the auspices of either a bilateral or multilateral commercial treaty, would have to be prepared either not to invoke the act of state doctrine, thereby signalling their willingness to play by liberal rules, or to invoke it and effectively declare their hostility to those rules.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n335 Foreign acts of state purporting to affect tangible U.S. property might still remain under the rule of Republic of Iraq v. First Nat'l City Bank, 333 F.2d 47 (1965), on the premise that territorial boundaries remain the simplest way to delineate spheres of legal authority regarding physical property. See Kramer, supra note 61, at 184.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

2. Nonapplication of the Act of State Doctrine to Liberal States: A Badge of Legitimacy. -- A liberal internationalist revision of the act of state doctrine would deprive liberal states and many quasi-liberal states of the option of invoking the act of state doctrine. Disputes would instead be resolved under ordinary conflicts rules, including the public policy exception, and doctrines governing the exercise of extraterritorial jurisdiction. In the conflicts setting, the Loucks formulation n336 controls: deference to the foreign act remains the rule, invalidation very much the exception. Thus for a quasi-liberal state the decision whether to invoke the doctrine or be treated as a member of the liberal community would not actually pose a very high risk of invalidation. On the contrary, as demonstrated above, when the act of state doctrine is applied as a conflicts rule, the upshot is generally consistent with a posture of cooperation rather than conflict. Indeed, among the core group of liberal states the invocation of the public policy exception is becoming

increasingly rare.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n336 See supra note 151 and accompanying text.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Outside the realm of ordinary conflicts analysis, U.S. rules concerning jurisdiction to prescribe are more likely to permit the United States to assert its own interests, but still within an overall framework of comity and reciprocity. A liberal internationalist approach would further encourage the revision of these rules to the extent necessary to maximize economic interaction among the states in question as part of an effort to encourage and expand the liberal trading community.

C. Revising the Liberal Internationalist Model

Fascinating as it may be to scholars, and frustrating as it often proves to practitioners, the act of state doctrine governs only a relatively small area of transnational legal relations. Changing the act of state doctrine will not change the world. The ultimate value of the liberal internationalist model rests less on its specific application to the act of state doctrine than on its power to shape a new understanding of both transnational law and, ultimately, public international law. To fulfill [*1993] this potential, the crude model elaborated in Part I will need substantial refinement. It will need to develop a more sophisticated set of criteria for differentiating between different types of domestic regimes and a more precise understanding of the concrete causal mechanisms that produce differences in the relations among liberal states, as opposed to those between liberal and nonliberal states.

The prospect of undertaking this enterprise reveals another strength of the liberal internationalist approach. Building a distinction between liberal and nonliberal states into current law will reconnect the disciplines of international law and international relations, thereby rendering a wealth of both theoretical insight and empirical data available to guide the reshaping of both public international and transnational law. Throughout this century, periodic calls for an integration of international law and international relations have often begun with appeals for international lawyers to take note of international politics. n337 Such appeals have accompanied the various efforts to reinterpret the principle of sovereign equality discussed in Part I, on the ground that the widening divide between the ideal of legal equality and the reality of political inequality was symptomatic of the growing disciplinary gulf between international law and international relations.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n337 John Westlake, an influential source for many twentieth century writers on sovereign equality, offers a typical appeal:

It is true that politics are not law, but an adequate motion [sic] of law cannot be gained without understanding the society in and for which it exists, and it is therefore necessary for the student of international law to appreciate the actual position of the great powers of Europe.
John Westlake, Chapters on the Principles of International Law 92 (1894).

The most prominent exponents of a "political" approach to international law after 1945 were members of the McDougal-Lasswell-Reisman school of policy-oriented jurisprudence, also known as the New Haven School. For a representative sampling, see Myres S. McDougal et al., Studies in World Public Order (1960); Myres S. McDougal et al., The World Constitutive Process of Authoritative Decision, 19 J. Leg. Educ. 253 (1967); Myres S. McDougal & W. Michael Reisman, International Law in Policy-Oriented Perspective, in The Structure and Process of International Law 103 (R. St.J. MacDonald & Douglas M. Johnston eds., 1983). For more catholic approaches to international legal scholarship that are equally sensitive to the importance of political context, see Abram Chayes, The Cuban Missile Crisis: International Crises and the Role of Law 100-06 (1974); Richard A. Falk, The Status of International Law in International Society 41-59 (1970); and Louis Henkin, How Nations Behave: Law and Foreign Policy 88-98 (2d ed. 1979).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

To bridge this historical gap, international legal scholars calling for a reintegration of international law and international politics have had to confront a series of supposed disciplinary dichotomies: law versus power, norm versus fact, equality versus hierarchy, idealism versus realism. These polarities have been strengthened by the post-World War II revival of political realism, the dominant school in international relations theory since Thucydides. Political realists posit that states are rational unitary actors whose behavior is dictated by the quest for [*1994] power to preserve and advance national security. n338 Until recently they have had little use for international law. n339

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n338 Thucydides, Machiavelli and Hobbes are the historical fathers of the Realist tradition. Twentieth century Realists include scholars E.H. Carr, Hans Morgenthau, George Kennan, Arnold Wolfers and Kenneth Waltz. For a characterization of Realism as the controlling theoretical "paradigm," see Robert O. Keohane, Theory of World Politics: Structural Realism and Beyond, in Neo-Realism and Its Critics 158, 158-203 (Robert O. Keohane ed., 1986).

n339 The regime theorists of the 1980s, led by international political economists such as Robert Keohane, Stephen Krasner, John Ruggie and Oran Young, have carved out a partial exception to this rule, admitting the value of legal rules and norms in reducing the transaction costs associated with the collective action problems inherent in international cooperation. Selections from these scholars and many others can be found in International Regimes (Stephen D. Krasner ed., 1983).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

International lawyers, on the other hand, have argued that legal recognition of a power differential among states is practically impossible and morally objectionable. From a legal perspective, as one scholar protested, "[n]otions like 'Great Power' or 'hegemony' are not juridical notions and will never be so without loss to their significance to politics." n340 From a moral perspective, differentiating among states solely on the basis of military and economic strength ignores the community of humanity behind the sovereign facade. Differences between democracies and dictatorships are regarded as irrelevant

for purposes of analyzing, predicting and constraining behavior in the international realm.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n340 Kooijmans, supra note 37, at 121.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Liberal internationalism offers an alternative political paradigm for political scientists and lawyers alike. n341 Liberal theories generally posit that the sources of international behavior lie in the relationship between states and society -- the economic, political and social links forged by domestic and transnational society. n342 Contrary to the political realists, the liberal internationalist axis of differentiation between states does not depend on cold calculations of power. But contrary to traditional international lawyers, neither does it hinge on the arid formalities of sovereignty. It rests instead on ideology and the different political, economic and social structures that underpin different ideological visions. It posits that ideological differences dictate positive differences in the nature of state-society relations; differences that in turn shape the way in which states relate to one another. Finally, from a moral standpoint, liberal internationalism welcomes all efforts to pierce the facade of the state and take account of the individual members of society behind it, although it would reject any reconceptualization of [*1995] the international system that did not regard states as the primary actors.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n341 Andrew Moravcsik has developed a Liberal paradigm as an alternative to the long-dominant Realist paradigm in a recent paper. See Liberalism and International Relations Theory (paper at the University of Chicago Program on Intl. Politics, Economics and Security (PIPES), Jan. 10, 1992) (copy on file with The Columbia Law Review).

n342 See id. at 9-10.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Applied to law, liberal internationalism opens a new vista for interdisciplinary cooperation. Unlike the realist distinction between strong and weak states, the liberal internationalist distinction between liberal and nonliberal states is not a chink in the normative dike that international lawyers have labored so long to build. It is a distinction based on an empirical and theoretical account of differences among states directly related to the strength of the domestic rule of law. As political scientists develop a more thorough and precise understanding of the distinctive international behavior of liberal states, they will provide international lawyers with the tools and materials to develop new theories of the preconditions for the international rule of law.

CONCLUSION

Hitler's confiscation of the property of German Jews in the 1930s violated the norms of all humanity. Cuba's retaliatory expropriation of the property

of U.S. investors offended U.S. public policy in 1963. n343 The Soviet refusal to allow its citizens to emigrate throughout the 1970s and 1980s was antithetical to international conceptions of fundamental human rights. n344 Yet in all these cases, as in cases likely to arise from the actions of religious fundamentalists, radical ethnic nationalists, and dictators of every stripe, courts concluded and are likely to continue to conclude that it is in the best interests of the United States to apply the act of state doctrine.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n343 See supra note 87 and accompanying text.

n344 See Frolova v. Union of Soviet Socialist Republics, 558 F. Supp. 358 (N.D. Ill. 1983).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The liberal internationalist model interprets and explains this result as entirely consistent with the values, goals and institutions of the United States as a liberal polity. It demonstrates that where liberal constitutionalism ceases, so also does the rule of law and the role of liberal courts. If such courts are to remain true to their function as conceived and established by liberal polities -- that of ascertaining, interpreting and applying the law -- they cannot act as agents of the law outside the liberal realm. They can, however, delimit that realm, with attendant economic and political consequences. Beyond interpretation, the liberal internationalist model demonstrates the ways in which the liberal-nonliberal distinction can be used to identify a range of different factors that produce specific judicial outcomes depending on whether liberal or nonliberal states are involved.

From a normative perspective, the liberal internationalist model rejects the pluralist vision long advocated not only as the necessary precondition of peace in a nuclear world, but also as a positive affirmation [*1996] of "diverse normative traditions." n345 In this view, domestic courts were to lay the cornerstone of a stable international legal order by "work[ing] out formal rules that [would] accord respect to rival social systems that act within their own sphere of competence." n346 The pluralist vision was and is a powerful vision. But it imagines an international legal order without regard to the domestic political order of its component states. The liberal internationalist model substitutes a universalist vision, but paradoxically seeks its spread through the vindication rather than the violation of the sovereignty of nonliberal states.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n345 Falk, supra note 82, at 66.

n346 Id. at 71.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Lawyers have long recognized differences between sovereign states, but they have lacked any means of bridging the gap between legal fiction and political reality. The liberal internationalist model draws a distinction between liberal and nonliberal states that is interpretively insightful, predictively useful

and normatively justifiable. It is a distinction that offers both international lawyers and political scientists a new way of looking at the world and ultimately of changing it.